Table of Contents

Authorities Cited

Constitutions

Statutes

Other Authorities

Law Reviews

Other Sources

In the Supreme Court
OF THE
United States

October Term, 1971

No. 71-507

Wilfred Keyes, et al.,
Petitioners,
(Plaintiffs below),

vs.

School District No. 1, Denver,
Colorado, et al.,
Respondents,
(Defendants below).

BRIEF AMICI CURIAE

On behalf of Robert G. Nelson, Gustav F. Fehlhaber, Patricia Chin, Alfretta Hankins, Mitsuo Murakami, Rose Noe, Marcel G. Ross, Charles Stringer II, Carlos H. Barbano, Adam P. Y. Gee, Frank G. Mastro and Mary D. Garcia in Support of the Position of Respondents

This brief is filed with the written consent of all the parties, pursuant to Rule 42 of the Rules of the Supreme Court of the United States. It is in support of the posi-

tion of the respondents, Denver School District No. 1 et al., that the Denver School District has not discriminated racially among the pupils it serves and should not now be required to do so.

INTEREST OF AMICI CURIAE

Amici curiae are San Franciscans who are, as intervenors, parties in the San Francisco elementary school desegregation case pending before the Court of Appeals for the Ninth Circuit: *David Johnson, et al. v. San Francisco Unified School District, et al.*, Nos. 71-1878, 71-2189; *San Francisco Unified School District, et al., Robert G. Nelson, et al. v. David Johnson, et al.*, Nos. 71-1877, 71-2163; *Guey Heung Lee, et al. v. David Johnson, et al.*, No. 71-2105. On March 1, 1972, the Ninth Circuit set aside the submission of the San Francisco case, stating in its order that the San Francisco case would be set for reargument only after this Court's decision in the case at bar. The Ninth Circuit thus recognized that the case at bar is likely to bear upon the future pupil assignment policy of the San Francisco Unified School District, as it will upon the future pupil assignment policy of Denver School District No. 1.[1]

Robert G. Nelson, Gustav F. Fehlhaber, Patricia Chin, Alfretta Hankins, Mitsuo Murakami, Rose Noe, Marcel G. Ross, Charles Stringer II, Carlos H. Burbano, Adam

---

[1]There is also pending before the Ninth Circuit an appeal by the Oxnard School District (California) from a summary judgment that a neighborhood school policy which does not improve racial balance violates a school district's constitutional duty to balance its schools racially (No. 71-2929); *Soria v. Oxnard School District Board of Trustees* (D.C. C.D.Cal. 1971) 328 F. Supp. 155.

P. Y. Gee, Frank G. Mastro and Mary D. Garcia include persons in each of the four major racial classifications presently used by the San Francisco Unified School District: Spanish speaking/Spanish surname; Negro/Black; Other White; and Asian.[2]

Robert G. Nelson, et al., are filing this brief because of their particular concern for San Francisco's public schools. Robert G. Nelson, et al., are also filing this brief because due process of law to the person—which the Fourteenth Amendment is supposed to protect—cannot be afforded solely by class actions in which the plaintiff class is racially defined (see, e.g., A. 1015-1016; 1515a-1516a). The assumption that one or more members of a racially defined group can be taken as representative of an entire racially defined group was reasonable when this Court was asked in *Brown v. Board of Education* (1954) 347 U.S. 483 to forbid exclusion by race created by mistaken belief in the objective reality, definability and relevance of racial groups. It is not reasonable when this Court is asked, even beyond the context of a remedial decree, to require that a school district act as though such beliefs are not mistaken.

We believe it will be helpful to this Court in fashioning a decision which must have nation-wide application to consider the effect upon another Western urban multiracial school district of the adoption of the theories which

---

[2]San Francisco uses nine "racial" classifications: Spanish speaking and/or Spanish surname; Other White; Negro/Black; Chinese; Japanese; Korean; American Indian; Filipino; Other Non-White. Because of the total uncertainty of the meaning of "Other Non-White" at its core as well as at its parameters, we do not know whether amici curiae include anyone in this classification or not.

the plaintiffs put forth in the case at bar. San Francisco, like Denver, for many years followed a neighborhood school policy. Pupils were included in an elementary school population on the basis of the proximity of their residence to the school. That policy remained substantially unchanged irrespective of the substantial growth proportionately over the years of San Francisco's Negro population and the more recent substantial growth of San Francisco's Chinese and Filipino populations. No pupil was excluded from a school on account of his race. In 1970, only one out of over a hundred San Francisco elementary schools was without a Negro pupil. In that school more pupils than not were of Chinese ancestry. No schools were without Caucasian pupils.

For several years, claimed "de facto segregation" of Negro pupils has been a matter of political controversy in San Francisco. The school case is not the first litigation resulting from the attractions afforded by multi-ethnic San Francisco to a migrating Negro population. Most of the San Francisco elementary schools which in 1971 the United States District Court found to be "identifiably black" (meaning in this instance 47.3 per cent or more "black") drew their pupils from public housing projects in which, on Federal constitutional grounds, the San Francisco Housing Authority was properly forbidden to impose racial quotas approximating the then proportion in San Francisco of "poor" whites and "poor" Negroes which these public housing projects were built to serve (*Banks v. Housing Authority of the City and County of San Francisco* (1953) 120 Cal.App.2d 1, certiorari denied (1954) 347 U.S. 974; see also *Progress Development Corp.*

v. Mitchell (D.C. N.D. Ill. E.D. 1960) 182 F.Supp. 681; *Cooney v. Katzen* (1963) 41 Misc. 236, 245 N.Y. Supp. 2d 548; *Taylor v. Leonard* (1954) 30 N.J. Super. 116, 103 A.2d 632).

In September, 1971, by order of the United States District Court, San Francisco reassigned by race many of its elementary school teachers and its entire elementary school population, about forty-seven thousand pupils from the kindergarten through the sixth grade. Over twenty-five thousand pupils were scheduled by the school district's computer to be bused. Neither the school district's plan nor the District Court's decree included any provision for notice to the pupil of his racial classification, nor any limitation upon the subsequent use by the school district of the pupil racial classifications memorialized in its computer system (cf. Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer* (1971) 49 Texas L.Rev. 837, 847).

San Francisco was given only six weeks to prepare a plan and nine weeks to implement it. The city was divided into seven new attendance zones. By design, racial quotas were to differ from the schools in one zone to the schools in another by as much as thirty per cent of the total number of elementary pupils in the school district. The district-wide percentage of Negro elementary pupils was assumed to be 28.7 per cent.[3] The projected assignments of Negro pupils ranged from 13.9 per cent in one zone to 37.1 per cent in another. In addition to wide variations

[3]The district-wide percentage of "Negro/Black" elementary pupils has recently been reported by the San Francisco Unified School District to be 32.2 per cent as of November 12, 1971.

in racial quotas, the class sizes and special services projected varied substantially from the schools in one zone to those in another. These disparities raised the issues in *Wright v. Council of City of Emporia* (1972) ___ S.Ct. ___; *United States v. Scotland Neck City Board of Education* (1972) ___ S.Ct. ___; *Serrano v. Priest* (1971) 5 Cal.3d 584; and (to the extent it embraced the same issues as *Serrano*) *Plessy v. Ferguson* (1896) 163 U.S. 537. These issues are before the Ninth Circuit in the appeals in the San Francisco case. Before the District Court and on appeal, Robert G. Nelson, et al., supported the only remedy proffered which was consistent with this Court's remedies decisions, the pupil reassignment plan proposed by the NAACP modified only to exclude the many elementary schools which the District Court found to be "integrated."

Except for the possible self-executing application of Title VIII, Section 803, of the *Education Amendments of 1972*, the District Court's order remains in effect in San Francisco. Motions by the school district and by Robert G. Nelson et al., for a stay were denied on July 7, 1971, and on August 10, 1971. Motions for a stay, or in the alternative for temporary modification of the order to perpetuate the status quo and thereby free those elementary pupils who remain in the system from the threat of reassignment to rebalance San Francisco's schools again in September, 1972, were denied in March, 1972.

PRELIMINARY STATEMENT

In *Wright v. Council of City of Emporia* (1972) ____ S.Ct. ____, *United States v. Scotland Neck City Board of Education* (1972) ____ S.Ct.____, *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, and *Green v. County School Board of New Kent County* (1968) 391 U.S. 430, this Court carefully preserved the distinction between rights and remedies in the school desegregation cases. This Court thereby preserved an aura of impermanence to the racial quotas associated with the administration of the remedies which this Court has allowed. Rights and remedies cannot be neatly packaged for separate impact upon children. To some, therefore, a universal right is inferred from remedies to date unlimited.

With an eye upon the remedy it appears that the harm to which *Brown* was addressed was racial imbalance, for a remedy may reasonably be presumed to be related directly to the harm to be offset. With an eye upon the absence of any period of limitations upon liability for wrongdoing, it appears that wrongdoing has become irrelevant, for one may not conclude lightly that the medieval doctrine of attaint of the blood has come back into fashion. "Segregation" has in this manner become synonymous with "racial imbalance." To some there appears to be no difference between segregation resulting from laws or from racially discriminatory acts by public officials, and racial imbalance resulting from demographic patterns and the choice of persons planning their lives within racially neutral governmental policy. Since racially neutral governmental policy sometimes does not provide racial balance, it follows that a racially neu-

tral policy must in all circumstances give way. A desire for symmetry among school districts has become a substitute for reasoned policy. A desire for educational reform has become an excuse for contradictory demands upon local school districts (A. 1595a). Whether or not a school district's pupil assignment policies exclude pupils by race, it becomes "unconstitutional" for a school district to be color blind. We are thus brought full circle. We are brought, for "benign" purposes, to the very place we were prior to the decisions in *Brown v. Board of Education* (1954) 347 U.S. 483 and *Brown v. Board of Education* (1955) 349 U.S. 294. We are brought to that place at a time of clamor from all directions for reform of the institution of public education.

The case at bar will tell whether a "* * * nonracial system of public education * * * is the ultimate end to be brought about * * *"[4] or whether means have redefined the end. The case at bar will also tell whether the Constitution will allow educational reform to include reasonable local resolution of questions of educational policy. Against a school board's legislative decisions not based upon race, plaintiffs propose that to achieve educational reform they should have been. Plaintiffs in effect propose that to achieve educational reform this Court require pupil assignment by race in every public school in the nation. Such a rule, irrespective of its purpose, would undermine the chief principle upon which court-ordered desegregation must rest, constitutionally, morally, and pragmatically: one may not because of his race be

[4] *Green v. County School Board of New Kent County* (1968) 391 U.S. 430, 436.

treated differently than another by law or by public officials. Such a rule seeks to foreclose natural racial and ethnic diversity among public schools.

The Constitution allows no such rule. Sensibly, it assigns to all arms of government limited powers. It assigns to legislative bodies controversies not justiciable. It assigns to Federal government enumerated powers. It assigns to this Court the role of arbiter, between the person and government whatever its branch, and among the branches of government whether state or Federal. The case at bar, accordingly, requires not alone that this Court weigh the right of the person that government as well as others treat him as a person and not as a fungible member of an arbitrarily defined group. It requires also that this Court weigh the claims of local school districts that they can best determine whether or in what manner the assignment of pupils by race to improve racial balance will further or impede the education of the individuals committed by law to their charge.

The issue, then, in the case at bar is whether all school districts must assign their pupils to schools by race for the purpose of balancing schools and classrooms racially. It will be soon enough if such a case is presented to decide whether or in what circumstances a school district may do so if it chooses.

SUMMARY OF ARGUMENT

"* * * [I]n what is called a free society all are equal as citizens without proof. Therefore, once a people chooses a free constitution and recognizes it as the

law of the land, there is nothing to prove or disprove about races as such, there is no issue to debate except the honest administration of the law" (Barzun, *Race: A Study In Superstition* (Harper & Row, N.Y., 1937 and 1965), Pref. to 2d Ed. at p. xii).

The plenary authority of school districts which do not distinguish among their pupils by race affords a road to racial integration more likely to consolidate the success already gained than that afforded by extending court-ordered racial quotas throughout the nation. School districts which have consistently pursued even-handed pupil assignment policies, school districts which have in doing so included Negro pupils in seventy-eight out of ninety-two elementary schools (Denver—A. 2038a) and in ninety-nine out of one hundred elementary schools (San Francisco), and school districts which have achieved substantial numbers of stable racially integrated elementary schools should not now be told that the Constitution requires that they orient racially all pupil assignment decisions.

The duty of a school district is to provide the best educational services it can to children within the district without discrimination against any child because of his race. That duty has been fulfilled by the Denver School District both in its "core area" schools and in its four so-called "resolution schools." The only "harm" which the Denver School District has done in either instance is to treat all pupils alike, irrespective of their race. The Denver School District and all others who pursue reasonable methods of pupil assignment which do not distinguish among pupils by race should be allowed to resolve for

themselves competing considerations of educational policy. The governing board of the Denver School District is best able to weigh for Denver the competing policy considerations which must bear upon legislative decisions.

To impose upon a school district a constitutional duty to balance its schools racially would impose upon all school districts a duty to classify pupils racially for the purpose of school and classroom assignment irrespective of its effect upon educational opportunity. To impose such a duty upon school districts would serve to undermine the power of local school boards in a manner which would weaken further the accountability of the other elements of the public school system to local governing boards and to those they serve. Moreover, such use by school districts of racial classifications would require that some school districts violate the Fourteenth Amendment, for such use of racial classifications may violate both due process and equal protection of the law. A racial quota is no less a racial quota by virtue of calling it something else, by allowing one quota one place and a different one elsewhere, or by changing it annually.

At best, the use of racial classification to assign pupils is required only by virtue of interim decisions of this Court, adopted as judicially supervised "equitable remedies" for deliberate exclusion of Negro pupils by the state or the school district. It should be required in no other circumstances without proof of (a) the definability of the group sought to be established or maintained as a legally cognizable "racial" group; (b) the fungibility of the members of the group as subjects of discrimination; and (c) the utility of the racial classification as a cor-

rective measure. That proof must be sufficient to overcome the presumption that racial classification is arbitrary and capricious, and is not the sort of classification which will further any reasonable legislative purpose. No such proof appears in the case at bar.

ARGUMENT

I. A STATE AGENCY'S FORBEARANCE IN THE ADOPTION OF A QUESTIONABLE EDUCATIONAL THEORY AS A BASIS FOR PUPIL ASSIGNMENT DOES NOT CONFER FEDERAL JURISDICTION. THE MISSION AND STRUCTURE OF PUBLIC SCHOOLS THROUGHOUT THE UNITED STATES SHOULD NOT BE RESOLVED BY A FOOTRACE TO THE FEDERAL COURTHOUSE.

The central question at the outset and at the end is whether it is the responsibility of the Denver School District to balance Denver's schools racially. The plaintiffs' argument that the Denver School District has, by allowing minority-dominated schools to exist, denied to plaintiffs equal protection of the law assumes that a school district has a constitutional duty to balance its schools racially. It thereby begs the question. School districts faced with conflicting demands—demands often racially oriented and often pressed by contentious and conflicting factions within a single racially defined group (cf. A. 945A)—cannot reasonably be presumed to be motivated by invidious racial discrimination because they adhere to even-handed policies. Obviously, "no State may effectively abdicate its [constitutional] responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be" (*Burton v. Wilmington Parking Authority* (1961)

365 U.S. 715, 725; Pl.Br., p. 114). But school boards which sense some complexity in educational issues, school boards required to resolve not only competing policy considerations but conflicting demands, cannot reasonably be charged with malignant neglect of duty merely because they can seldom satisfy everyone and can never satisfy some.

School districts are not like the Alabama police officer who "would not lift a finger" to protect freedom riders (*United States v. U.S. Klans, Knights of Ku Klux Klan, Inc.* (D.C.M.D.Ala. N.D. 1961) 194 F.Supp. 897, 901). The responsibility of states to maintain order is plain. The governance of a school district is seldom as simple as police protection against organized violence is at least assumed to be. We would likely discover that affording police protection is no simple matter either if we were to start with the conclusion that New York's finest are uniformly inferior to the village constable by virtue of notably different crime rates with which each must contend. That is in effect the approach which plaintiffs take to public education in general and to Denver's schools in particular. From the existence of racial imbalance, plaintiffs conclude that Denver's educational policies and decisions have been racially discriminatory, irrespective of all evidence to the contrary. From the existence of "unequal" educational "outcomes" measured by arbitrarily defined groups, plaintiffs conclude that they are being denied an "equal educational opportunity."

A. "Equal educational opportunity" is a slogan which means different things to different people.

Every person is entitled to equal protection of the law. In education, this principle has been translated into a demand for "equal educational opportunity." "Equal educational opportunity" relates to a process taking place in school buildings. Beyond that, there is little consensus (see Gordon, *Toward Defining Equality of Educational Opportunity*, pp. 423, 427 et seq. in Mosteller and Moynihan, *On Equality of Educational Opportunity* (Vintage Books, N.Y., 1972); see also Silberman, *Crisis in the Classroom* (Random House, N.Y., 1970) passim). The classical notion of the mid-nineteenth century, with which the first compulsory education laws were introduced, was that the state is obliged through its educational system to "restrain the inherent savagery of children," and to mold a character acceptable to that part of the adult world able politically to establish community standards (Katz, M., *The Irony of Early School Reform* (Harv. Univ. Press, 1968) pp. 117, et seq.). The modern notion was that the state should provide a school building and incidental supplies with teachers equipped to impart literary and mathematical skills which the pupil might or might not learn (see Dewey, *Intelligence in the Modern World* (Mod. Lib., N.Y., 1939) pp. 683-687). Although a shift in emphasis from the school to the child during the modern period resulted in changes in teaching method, the object remained to maximize individual potential (see Cremin, *The Transformation of the School* (Alfred A. Knopf, N.Y., 1961) pp. 104, 201-202). Everyone had an "opportunity" to learn. If the hardware was equal, the opportunity was equal. No one was surprised that out-

comes were different because it has long been believed that people have different talents, aptitudes and interests.

This unsophisticated modern notion of "equal educational opportunity" was largely eclipsed by the publication in 1966 of an expensive study commissioned by Congress: Coleman, *Equality of Educational Opportunity*, U.S. Dept. of Health, Educ. & Welfare, U.S. Gov't. Printing Office, 1966.[5] The Civil Rights Act of 1964 directed the U.S. Office of Education to make a survey and report "concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion or national origin in public educational institutions * * *." A lack assumed is a lack predictably found. But the lack found was not the sort expected (Mosteller and Moynihan, *On Equality of Educational Opportunity* (Vintage Books, N.Y., 1972) pp. 8-12; 117-119). Prior to the Coleman Report, it was believed that schools which Negro children attended would prove to have inferior facilities. Coleman found this not to be the case (Mosteller, op. cit. supra, pp. 8-12). Further, the range of performance within each school was greater than school-to-school variations, at all grade levels, for all racial and ethnic groups (Coleman Report, p. 296; cf. A. 626a). From Coleman's findings, one could reasonably conclude that no one was being shortchanged by the nation's public school system, at least within large geographic regions, and that everyone was being afforded an opportunity to maximize whatever academic potential he brought to school with him (see Mosteller, op. cit. supra, pp. 11-12).

---

[5]We shall throughout this brief refer to this publication by its common name, the Coleman Report.

The Coleman Report, however, furnished a toehold for redefining "equal educational opportunity" (see Moynihan, *Sources of Resistance to the Coleman Report*, in *Equality of Educational Opportunity* (Harv. Univ. Press, 1969) p. 25 et seq.). In the school districts studied (which did not include Denver—A. 1561a-1562a) a statistical disparity was found between the median test scores of Negro pupils and the median test scores of white pupils (Coleman Report, pp. 20-21). Since the samples of Negroes studied did not perform as well on the average as the samples of whites on the particular standardized tests provided, an educational lack was assumed to be the cause. "Equal educational opportunity" could now be redefined as educational "outcomes" by racially defined groups. Disparity in the median achievement levels of Negroes and whites on public school achievement tests could now be used to establish group "inequality," contrary to the direction of the Civil Rights Act of 1964 and contrary to the requirements of the Fourteenth Amendment.

B. If "inequality" is to be defined as statistical disparity in the median achievement levels of arbitrarily defined groups, there is no clear way to achieve "equality."

The implication for sensible policy of the Coleman Report redefinition of equal educational opportunity is not at all clear. Perhaps the solution lies in giving new standardized tests to demonstrate group equality. See Mayer, *The Schools* (Harper & Bros., N.Y., 1961) at page 112 for an account of the construction of tests in Rockford, Illinois, which would ensure that middle-class children will *not* do better than lower-class children. Perhaps, on the other hand, Dr. Coleman's standardized tests

are themselves to become required by the Constitution so that the "inequality" of slum children may be preserved.

"There are two ways * * * of looking at the [Coleman Report] and its aftermath. It can, in effect, be judged a worthy enterprise but so flawed in its execution as to be of no real use. . . . This is the view of Henry M. Levin . . . : 'For a piece of large-scale research, there are big portions of data that are worthwhile and salvageable. But there is absolutely nothing in the report to support policy decisions. Its social value is zero.' An alternative view would hold that some findings . . . offer policy makers important information in some areas and point to new questions requiring investigation in others" (Mosteller, op. cit. supra, at pp. 43, 44).

"One of the principal weaknesses of the Coleman Report is that it failed to put sufficient emphasis on the fact that its findings, being based only on cross-sectional data, could be regarded as no more than highly tentative hypotheses and therefore highly inadequate grounds for any firm decisions about the future direction that American education ought to take" (Mosteller, op. cit. supra, pp. 405-06). The central problem in the use of the Coleman Report for policy decisions is that Coleman collected statistics only over a brief period. Dr. Coleman was careful to point out in his testimony in this case that his findings at best described only static, existing, correlations (A. 1542a). To consider all of Coleman's correlations as causation factors would result in bizarre, if not unconstitutional, effects. Cafeterias, for example, have a negative correlation with achievement scores. The more there are the worse pupils do (Coleman Report, pp. 9-12). Yet, presumably, no one

would argue that taking cafeterias out of predominantly Negro schools would improve the educational opportunity of Negro pupils.

1. "The smart will teach the dumb."

The District Court below concluded that "it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students" (App. to Pet. for certiorari, 113a). Perhaps reflecting his earlier preoccupation with peer-group relationships (Coleman, *The Adolescent Society* (Free Press of Glencoe, N.Y., 1961)), Dr. Coleman testified below that "what was the most related to the performance were the characteristics of other students" (A. 1532a). "What that means in effect is that, if the inference is correct, is that a child from a linguistically impoverished background will be most affected by a school situation which has a—which is more linguistic, particularly the rich or different educated environment" (A. 1543a). The middle-class was credited universally with "a majority effect" (A. 1535a), and the mechanism was that of necessity: "I have often used the analogy of an English-speaking child attending a school in which all the children spoke French. • • • [H]e would very quickly come to learn French; not through anything other than the fact of being confronted every minute of the day with the necessity for communicating with those students" (A. 1555a). This theory has obvious limitations in situations and in school districts in which the middle-class does not predominate. Dr. Sullivan had a different picture of the hoped-for improvement in achievement: "But when [the Negro child] came home from the white school and when

he was going back the next day to compete with whitey he started to do his homework * * * (A. 1571a). Another view is embodied in the work of Irwin Katz, who found that Negroes perform best in interracial situations free of social and failure threat, moderately well in all-Negro situations, and worst in interracial situations characterized by social and failure threat (Katz, I., *Review of Evidence Relating to Effects of Desegregation on the Intellectual Performance of Negroes* (1964) 19 Amer. Psychologist 391).

No one presently knows whether the statistically significant median Negro "pupil" will act like the cooperative model projected by Dr. Coleman, the racially-hostile model projected by Dr. Sullivan or the more varied model projected by Dr. Katz. No one, therefore, knows whether or in what circumstances the model will raise or lower his achievement score so as to reduce or exacerbate "inequality of educational opportunity" as redefined by Coleman. By virtue of its single-shot nature, the Coleman Report does not even offer much of a clue. The indications from one study of two hundred sixty-six children are that modest gains in I.Q. scores took place in grades one through four when children were bused from slum schools into suburban schools, *with not more than three bused children* placed in the suburban classroom (see report on Hartford, Conn., Project Concern in Mosteller, op. cit. supra, pp. 408-409). One study of one thousand four hundred ninth graders in Pittsburgh suggests that "desegregation" appears to elevate achievement and lower educational aspirations. One explanation for this result is that majority-white schools discourage high educational aspirations among Negro pupils (Mosteller, op. cit. supra,

pp. 363-364; see also DuBois, *The Autobiography of W.E.B. DuBois* (Int'l. Publishers, N.Y., 1968) pp. 101, 230-231, and Pl.Br., at pp. 33-34). Another explanation, put forward by Irwin Katz, is that integration benefits learning among Negro children by "lowering their aspirations to more effective and realistic levels" (Mosteller, op. cit. supra, p. 364).

A recent article by David J. Armor describes several studies which cast further doubt upon the speculation that racial balance will improve the achievement of Negro pupils. The studies described by Armor were, moreover, "longitudinal" studies. Unlike the Coleman Report, they compared groups of pupils over a span of time (Armor, *The Evidence on Busing* (1972) 28 The Public Interest 90).

In trying to project from static to dynamic situations, the road is seldom plain. Coleman's major speculation was that "attributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff" (Coleman Report, p. 302). The table upon which this speculation is based shows an exception: At grade 6, white Northern children show a greater percentage variance in verbal achievement accounted for by student body quality than do Northern Negroes, an exception to the balance of the table (Ibid. p. 303). This exception clouds Coleman's speculation that "minority" children are more affected than others by the attributes of their classmates. It would, however, if race were pertinent and Coleman's methodology were sound, establish that the presence of Northern Negro classmates

sometimes affects adversely the achievement of Northern white children, whereas the presence of white classmates seldom benefits Northern Negro children. For a painstaking review of the possible results and theoretical underpinnings of desegregation strategy, see Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis* (1972) 60 Cal.L.Rev. 275, 408-435.

Projection from static correlations to dynamic situations is not the only weakness in the use of the Coleman Report for policy decisions. Coleman did not correlate his test performance data with predominantly white or predominantly black schools. David J. Armor reanalyzed the Coleman data by breaking Coleman's samples into predominantly black and predominantly white schools. Armor found that according to Coleman's data the average white in a predominantly white school consistently had a higher average verbal achievement score than the average black in the same school, and that the average black in predominantly black schools had an average verbal achievement score higher than the average white in those schools (Mosteller, op. sit. supra, pp. 197, 198, 229). Could it be that most Negroes, like anyone else, are most comfortable, secure and able to achieve well in situations in which they are in the majority? See Bettelheim and Janowitz, *Social Change and Prejudice* (Free Press of Glencoe, N.Y., (1964) p. 87.

The Coleman Report, as well as Dr. Coleman's testimony below, generalized from the measurement of populations. Neither a mean nor a median achievement level demonstrates much about the academic performance

within the populations compared.[6] Comparison of the median of almost any population classification with another will show a disparate result. In 1904, Max Weber postulated that the Protestant ethos had a great influence on the development of Western civilization (Weber, *Die Prostestantiche Ethik und der Geist des Kapitalismus,* 20 Arch. Sozialwiss u. Sozialpolitik 1-54 (1904); 21 Arch. Sozialwiss u. Sozialpolitik 1-110 (1905); see also Tawney, *Religion and the Rise of Capitalism* (Harcourt, Brace & Co., N.Y. 1926)). Efforts to substantiate this thesis continue to the present day, with the current results being that Jewish males possess a high achievement motivation at all socio-economic levels, Catholics the next highest achievement motivation and Protestants the least (see Heckhausen, *The Anatomy of Achievement Motivation* (Academic Press, N.Y., 1967) pp. 31, 160-161). The Civil Rights Act of 1964 mentioned religion as well as race. It is fortunate that Dr. Coleman disregarded both the current research into the effect of religious affiliation and the language of the Civil Rights Act of 1964 and did not classify his samples by religious affiliation.

Dr. Coleman's invidious statistical comparison of one racially defined group with another is highly suspect. It is firmly in the tradition of the measurement of personal traits for the purpose of justifying racial classifications. In 1764, for example, Daubenton was measuring in degrees the position of the head on the top of the spinal column and correlating the measure of that angle with the

---

[6]Coleman sometimes used "mean," sometimes "median" and sometimes "average."

"amount of will power" in the several races (Barzun, op. cit. supra, at p. 35). Studies comparing the intelligence, temperament, biological "strength" and "morality" of the several races continue to the present day (see Simpson and Yinger, *Racial and Cultural Minorities* (3rd ed.) (Harper & Row, N.Y., 1965) pp. 45-47). Even if a disparate median level of achievement on standardized tests were a sufficient basis for constitutional principle, it has not even been demonstrated that the median level of achievement at predominantly "Negro" schools is uniformly lower than in predominantly "white" schools. School children in North Dakota, which has a predominantly white population, score well below national norms (Silberman, *Crisis in the Classroom* (Random House, N.Y., 1970) p. 285). At least six predominantly "Anglo" schools in Denver (College View, 74.0 per cent Anglo; Columbian, 66.6 per cent Anglo; Barnum, 69.9 per cent Anglo; Belmont, 71.9 per cent Anglo; Thatcher, 81.1 per cent Anglo; and Sherman, 76.7 per cent Anglo) scored lower in fifth grade achievement than Hallett (84.4 per cent Negro) (Pl.Exh. 106, A. 2042a). Dr. Coleman's invidious statistical comparison becomes even more suspect when one considers that forty per cent of Negro middle-class high school age children attend private schools whereas only thirteen per cent of white middle-class high school age children attend private schools (Mosteller, op. cit. supra, p. 65, fn. 25).

2 "The rich will teach the poor."

Dr. Coleman himself opines that disparity of outcome is the result not of race but of the disparity of social class backgrounds children bring to school. His specula-

tion that racial balance will improve Negro achievement is founded upon a congruence between "class" and "race" (A. 1534a). This Court recognized in *James v. Valtierra* (1971) 402 U.S. 137, that there is no congruence between "class" and "race" (cf. *Jefferson v. Hackney* (1972) 92 S. Ct. 1724).

The experts who testified below were not offered as experts in race relations, in general demography, or in the demographic patterns of Denver. Dr. Coleman described himself as a sociologist (A. 1516a). Dr. Sullivan described himself as the Secretary of the Massachusetts State Board of Education (A. 1563a). Dr. O'Reilly described himself as an educational psychologist and Chief of the Bureau of School and Cultural Research of the New York State Education Department (A. 1910a-1911a). Evidently, Drs. Coleman and O'Reilly are experts in administering psychological tests and Dr. Sullivan is an expert in administering schools. These witnesses nonetheless testified as to conclusions not only regarding Denver population patterns but as to all cities. They concluded—upon what evidence it is difficult to imagine—that every neighborhood in every city is homogeneous both as to "class" and "race" (A. 1551a, 1950a, 1947a, 1593a-1594a). Dr. Coleman further concluded that neighborhoods are always congruent with school attendance zones (A. 1559a).

These same experts are aware that some Negroes and some "Hispanos" are middle-class (O'Reilly, A. 1952a; Sullivan, A. 1594a; Coleman, A. 1532a-1536). Either a given racial and ethnic group is all one "class" or not every neighborhood is homogeneous as to "class" and

"race." Logic cannot have it both ways. Without benefit of the flagrantly inconsistent conclusionary testimony of two psychologists and one school administrator, common knowledge suggests that both conclusions are wrong. City neighborhoods are seldom homogeneous; and "class" is not congruent with "race." State Senator George L. Brown, Jr., testifying for the plaintiffs, was aware that a middle-class black community exists in Denver (A. 892a), as it does in most if not all cities.

The record in the case at bar affords no better basis for overturning the legislative decisions of a school board than is offered by the hodge-podge of sociology, educational theory, and definition of races upon which second-guessing Denver's school board was based. The "equal educational opportunity" argument is at best an effort to incorporate into the Constitution the preference of some of today's school administrators for heterogeneous ability grouping by mistakenly using racial classification for the purpose. Even if the theory of heterogeneous ability grouping is correct, low achievement will not be improved by racial balance, for race and academic achievement are not congruent. Low achievement will not be improved no matter how "race" is defined if the achievement models remain constant. If one sinks promptly to the bottom of the swimming pool with others in one swimming class, one will be no more encouraged about learning to swim than if one sinks promptly to the bottom of the pool with others in a different swimming class.

The theory of heterogeneous ability grouping may, of course, be incorrect. That theory, conveniently revived contemporaneously with the Coleman Report, does not

account for the child who floats when all around him are sinking. Nor does it account for the low achieving pupil in a high achieving classroom. Educational theory is in a constant state of ferment and today's imperative is tomorrow's cause for reform (cf. Cremin, op.cit. supra, pp. 23-57 for the checkered career of the manual training high school; and compare ibid., at p. 297-299 for the evolution of individualized instruction into the "tracking" system with Pl.Br., pp. 80-81 and 95). Heterogeneous ability grouping is now considered by some to be educationally desirable, and academic "tracking" condemned (see *Hobson v. Hansen* (D.C.D.C. 1967) 269 F. Supp. 401, 492). At the same time, the Procrustes' bed approach to racial and ethnic differences has been replaced by demands for black studies and ethnic separation for at least a part of the school day.

3. "The black will teach the white."

There are some who argue that there is a sufficient overlap between class and race that improvement in Negro reading scores *might* result from balancing schools racially, and another objective would be furthered. More children of different races would get to know each other and thereby shed their prejudices (contra Armor, *The Evidence on Busing* (1972) 28 The Public Interest 90, 120-122, Figures 7-10).

The goal is laudable. In setting policy, however, one must consider not only the desirability of the goal but how best to achieve it. The mechanisms by which prejudice may be ameliorated are not well known (see Glazer, *Is Busing Necessary*, Commentary, March, 1972, p. 39,

reprinted in Cong. Record, March 13, 1972, S-3855; see also Simpson and Yinger, *Racial and Cultural Minorities* (3rd ed.) (Harper & Row, N.Y., 1965) pp. 503-521). Allport reports a study of one hundred white boys who lived twenty-eight days in a bi-racial camp. He found that at the end of this experience twenty-five per cent "showed a marked lessening of prejudice during the period of camping, but about the same number showed a marked increase in prejudice" (Allport, *The Nature of Prejudice* (Beacon Press, Boston 1954) p. 280, and see pp. 395-457 on the characteristics of the prejudiced personality). Until we know much more about each set of boys, there is no way of knowing even as a matter of reasonable probability whether particular strategies add to or subtract from the sum total of racial prejudice. The circumstances in which the members of racially defined groups meet, as well as personal background and individual personality, appear to be material. In addition to sociocultural factors (Ibid., pp. 218-339) and personality factors (Ibid., pp. 395-457) that might contribute to fostering attitudes of prejudice, Allport described contact effects: Casual contacts and contacts where the group traditionally discriminated against is of lower status tend to reinforce negative stereotypes (Ibid., pp. 264, 276). Equal status contacts and those in which the member of the class discriminated against has higher status tend to lessen prejudice (Ibid., p. 276). There are, accordingly, those who recommend that if the object is to mitigate racial hostility, we should make sure that schools are balanced racially only within the same social class. (see National Academy of Sciences, *Freedom of Choice in Housing, Opportunities and Constraints,* Advisory Committee to H.U.D., Washington, D.C. 1972).

The counter-productive effect of balancing schools by social class results from the mistaken impression from casual contact that class differences are related to visible physical indicia by which race often becomes defined (cf. Barzun, op.cit. supra). "One of the central sociological hypotheses in the integration policy is that integration should reduce racial stereotypes, increase tolerance, and generally improve race relations. Needless to say, we were quite surprised when our data failed to verify this axiom. Our surprise was increased substantially when we discovered that, in fact, the converse appears to be true" (Armor, *The Evidence on Busing* (1972) 28 The Public Interest 90, 102).

The occasion for surprise should not be that the sociologist's data has failed to verify the sociologist's hypothesis, nor even that some sociologists prefer axioms to hypotheses. The chief occasion for surprise should be that the sociologist who studied under Allport is surprised. Casual contact carries with it a screening effect which allows the observer to "see" only those aspects of behavior which confirm his predispositions (Allport, op. cit. supra, at p. 264). Thus one observer, encountering a newspaper article describing a school with "no graded courses in geography, American and Ohio history, natural science, government and other required subjects" where the children spent time in school copying diary entries referring to plowing and cleaning the raspberry patch, ironing, and feeding the turkey broilers commented: "One's first reaction to such an education might be one of sympathy for the children deprived of their birthright in a free society. Upon further consideration, however,

the example illustrates not the depravity of the Amish parents, but the sharp difference in the educational task of a stable farming society and that of a rapidly changing highly industrialized society" (Coleman, *The Adolescent Society* (Free Press of Glencoe, N.Y., 1961) p. 2). Later on the same distinguished author criticizes grading and deplores the fact that the adolescent has no useful work to perform (Ibid. pp. 3, 317).

Neither school boards nor Federal courts can reasonably be expected to do away by fiat with racial prejudice. Law alone, like other social forces, and like laws affecting other institutions, may not be able to alter these relations beyond a certain point, and in some situations it cannot make much difference. But some law commentators who have addressed themselves to compelling racial balance have been as simplistic about goals and methods as sociologists are uncertain about both. In *Sweatt v. Painter* (1950) 339 U.S. 629, this Court held that the exclusion of a Negro plaintiff from a law school on account of his race was inherently unequal treatment. Some law commentators have suggested that this holding could be reformulated to say that a law school attended only by Negroes is inherently unequal; and that this reformulation of *Sweatt v. Painter*, supra, could serve as the foundation of a constitutional duty. Such a duty would require not only the admission of a pupil otherwise qualified to the school of his choice, but also the deliberate structuring of all schools so that the choice would be among like alternatives. One visible "equalization" would be to balance the racial composition of all the schools in a system. "Equal educational opportunity" would thereby

become equated with racial balance, and racial balance would be a constitutional imperative (see *Developments in the Law—Equal Protection* (1969) 82 Harv.L.Rev. 1065); Kaplan, *Segregation Litigation and the Schools—Part II The General Northern Problem* (1963) 68 Harv.L.Rev. 564; Wright, *Public School Desegregation: Legal Remedies for de facto Segregation* (1965) 40 N.Y.U.L.Rev. 285; *Hobson v. Hansen* (D.C.D.C. 1967) 269 F.Supp. 401, 497, 503-506).

Lawyers might with profit ponder the words of Edmond Cahn, commenting upon the origins in the writings of a distinguished sociologist of the national origins quota system in the Immigration Act of 1921:

"Only a generation ago, McDougall was a leader in his profession; as recently as 1943 Roscoe Pound saw fit to assign reasons for not adopting McDougall's concepts of social psychology. Yet, anyone who has a sufficiently strong stomach to read McDougall's *Is America Safe for Democracy?*—a book published while he was professor of psychology at Harvard—will find it filled with racist slander, crude propaganda and arrant nonsense. The book provided a cloak of pseudo-scientific respectability for agitation resulting in the Immigration Act of 1921 and the national origins quota system.

"Social psychology is certainly not to be charged for all time with McDougall's sins against science. On the contrary, it is the law educators who will be blameworthy if they undertake the use of psychological theories and studies in a naive and credulous spirit. We cannot afford to settle for less than the truth. For if a license to purvey loose opinions as scientific facts is given to those who will testify on

the egalitarian side, why is not a similar license available to the William McDougalls?

"* * * Our search for truth requires an unremitting awareness of covert interests—interests ranging from the very finest to the basest——

"* * * [T]here is no substitute for the vigilant exercise of critical intelligence. Where public justice is concerned, an educator has no more right to play the dupe than the deceiver" (Cahn, *Confronting Injustice* (Little, Brown and Company, Boston, 1966) pp. 356, 357).

C. The strategies for improvement of pupil achievement which plaintiffs urge be required by the Constitution would create conflicting constitutional duties.

Good intentions do not always produce unmixed blessings. In 1909, a distinguished educator, Leonard Ayres, published a book, *Laggards In Our Schools* (N.Y., 1909). He collected data from school records, and statistics and reports collected and published by government agencies showing that schools were filled with children over age for their grade and that most students dropped out before finishing the eighth grade. Criticized on methodological grounds, he conducted another study of over two hundred thousand elementary school children. It confirmed his earlier work. Although Ayres' concern was efficiency and parsimony in school operation, one major outcome was the widespread practice of age promotion regardless of achievement, the practice about which plaintiffs now complain bitterly (compare Callahan, *Education and the Cult of Efficiency* (Univ. of Chi. Press, 1962) pp. 14-18, 165-168 with Pl.Br., pp. 52, 53). The choice between age promotion and achievement pro-

motion is never easy. Surely it would not lower the dropout rate, one of plaintiff's measures of inequality of educational opportunity (Pl.Br., p. 53), to require that children spend their school days with younger children. The reaction of the sixteen-year-old put into the sixth grade is predictable, irrespective of race.

Recently, "educational input" in the form of dollars spent upon facilities has been re-emphasized in *Rodriguez v. San Antonio Independent School District* (D.C. W.D. Tex., 1969) 299 F.Supp. 476, (1972) 337 F.Supp. 280, review granted June 6, 1972, U.S. Sup. Ct. Dkt. No. 71-1332; and in *Serrano v. Priest* (1971) 5 Cal.3d 584. The theory of equality of input upon which these cases are based appears to be a reversion to a pre-Coleman Report measurement of "equal educational opportunity." We will not presume to guess whether it is the California Supreme Court or Dr. Coleman who is in the backwater. Certainly it is not Leonard Ayres, echoed below by Dr. O'Reilly, who would lower the dropout rate (A. 1938a), increase the efficiency of the teacher by increasing the "information transmitted" (A. 1953a) without any costly preparations (A. 1962a) by eliminating minority-dominated schools. Dr. O'Reilly's opinion was that expensive compensatory education programs were "valueless" (A. 1929a). Amazed at this turn of events, the District Court below repeated its question and Dr. O'Reilly explained that "it's nothing particularly new about any of these things" (A. 1929a).

Inconsistently with their thesis that Anglo pupils are the chief "learning resources" and in pursuit of one aspect of the equal dollar theory, plaintiffs argue that the

quality, experience and stability of teaching staffs is inferior at minority-dominated schools (Pl.Br., pp. 40-43). Even if this proposition were true generally, which is doubtful, it does not appear to be true in Denver. Plaintiffs' Exhibit 510 (A. 2124a) discloses, for example, that Wyatt elementary school, with an enrollment of only two per cent Anglo pupils had in 1968 a median teacher experience level exceeding the city-wide average.

Dr. Coleman testified only that, in general, teacher characteristics had some effect on achievement (A. 1531-1532a). According to the Coleman Report, teacher variables that showed some effect on Negro achievement were: "the teachers' own education (positive effect), and the score on the vocabulary test (positive effect). Teachers' attitudes showed a slight effect in some grades (negative effect of preference for middle-class students); as did experience (positive effect), while localism and proportion white show little or no effect. For other minority groups, similar results hold, except that teachers' experience shows inconsistent directions of effect, suggesting that it has no effect of its own * * *" (Coleman Report, pp. 317-318).

Measuring teacher effectiveness has been more of a continuing puzzle to education researchers than to common sense. It would be strange indeed if the Federal courts were now to embark upon the elaborate and futile efforts which have for years characterized education research into the measurement of teacher effectiveness. See Koerner, *The Miseducation of American Teachers* (Houghton Mifflin Co., Boston, 1965) pp. 52-55: It is a commonplace that there are good and bad teachers of all races, ages

and salary levels and the fervent hope of all parents is that the school district will hire competent teachers. As in San Francisco, the Denver School District pursued a policy of allocating more teachers per pupil to schools in which achievement levels were lower (A. 1327a-1329a).

School boards are today faced with a bewildering variety of conflicting standards for pupil assignment as proposed mandatory alternatives to geographic proximity:

1. An equal distribution of Negro pupils throughout a district. This appears to be the standard allowed by this Court in its recent remedies decisions: *Wright v. Council of City of Emporia* (1972) ___ S.Ct. ___; *United States v. Scotland Neck City Board of Education* (1972) ___ S.Ct. ___; *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1.

2. An equal distribution of "minority" pupils throughout a district. This appears to be the standard being urged as a constitutional requirement by plaintiffs in this case and in Corpus Christi, Texas (see *Cisneros v. Corpus Christi Independent School District* (D.C. S.D.Tex. 1971) 330 F.Supp. 1377 (appeal pending); see, contra, *United States v. Midland Independent School District* (D.C. W.D. Tex. 1971) 334 F.Supp. 147).

3. An equal distribution of low-achieving pupils throughout a district. This is a standard being urged as a constitutional requirement in a class action being litigated against the San Francisco Unified School District for its maintenance of an academic high school (Lowell High) to which admissions are by academic achievement

(*Berkelman et al. v. San Francisco Unified School District*, No. C-71-1875, D.C. N.D. Cal.).

4. A distribution of pupils throughout several districts so that (i) Negro pupils, or (ii) minority pupils, or (iii) low-achieving pupils will always be in a minority. This distribution offers three possible standards. It is distinguished from the others, however, by its involvement of more than one school district and is in Federal litigation in Richmond, Virginia, Detroit, Michigan, and Indianapolis, Indiana (*Bradley v. School Board of the City of Richmond, Virginia* (D.C. E.D. Va. 1972) 338 F.Supp. 67; reversed (1972) ___ F.2d ___; *Bradley v. Milliken* (D.C. E.D. Mich., 1971) 338 F.Supp. 582; *United States v. Board of School Com'rs. of the City of Indianapolis, Indiana* (D.C., S.D., Ind. 1971) 332 F.Supp. 655.

5. A distribution of pupils among schools so that the average "wealth" of the families represented in the schools is equal. This standard is being pressed upon the Duluth, Minnesota, school district (see Hubert, *The Duluth Experience*, Saturday Review, May 27, 1972, p. 55 et seq.).

6. An equal distribution of pupils classified by sex.

7. An equal distribution of pupils classified by achievement without regard to sex. Standards 6 and 7 are also involved in San Francisco's Lowell High case.

8. An equal distribution of pupils classified by religion. Religion as well as race is specified in the Civil Rights Act of 1964. Presumably, this standard would raise the same type of constitutional question as does the use of race as a standard for pupil assignment to schools.

9. An equal distribution of pupils among schools in which dollar inputs are equal. This standard is offered by *Rodriguez v. San Antonio Independent School District* (D.C. W.D. Tex. 1969) 299 F. Supp. 476; (1972) 337 F.Supp. 280, review granted June 6, 1972, U.S. Sup.Ct. Dkt. No. 71-1332; and by *Serrano v. Priest* (1971) 5 Cal. 3d 584.

Any of these standards might require "equal distribution" of pupils either to schools or to classrooms. Each of these standards conflicts with the other, because each defines differently the group upon which the standard is based. Each standard except the last assumes that children learn more from each other than they do from their teachers. The geographic area throughout which the "learning resources" found in other children can be distributed is limited only by travel time, and perhaps not by that for the home itself is viewed by some as a sufficiently universal detriment to encroach upon it further. Dr. Coleman has argued in favor of replacing the family environment of the low achiever as much as possible "with an educational environment—by starting school at an earlier age, and by having a school which begins very early in the day and ends very late" (Coleman, *Equal Schools or Equal Students?* (1966) 4 The Public Interest 70, 74; see also, Levine, *Ocean-Hill Brownsville: Schools in Crisis,* (Popular Library, N.Y. 1969) p. 143). Others advance similar views in seeking to expand the school year, the number of years in school and the children subject to regulation by the public school system (see, e.g., Cremin, *The Transformation of the School* Alfred A. Knopf, N.Y., 1961) pp. 325-332 for an account

of "the best-laid plans of the teaching profession for American education in the post-war decades," which was to embrace "a comprehensive public school system concerned with all young people from the age of three through twenty, those in school as well as those outside").

There is some evidence that it is Negro children who can least afford to have the family undermined or replaced, that it is Negro children who most need the family to be supported and strengthened (see Simpson and Yinger, *Racial and Cultural Minorities* (3rd Ed.) (Harper & Row, N.Y., 1965) pp. 349-355; Erikson, *Identity, Youth and Crisis* (W.W. Norton & Company, N.Y., 1968) at p. 311: "Can Negro culture afford to have the 'strong mother' stereotyped as a liability?").

It is curious in itself that an institution whose professional representatives admit teaching failure and credit the home with the production of the institution's chief "learning resources"—other children—should look chiefly to further encroachment upon all homes as the solution to its problems. For an account of the results of a similar venture with the "platoon school" operated from 8 A.M. to 5 P.M. and on Saturdays, see Callahan, op.cit. supra, at pages 126-147. For an account of the origin of the kindergarten in philanthropic concern with the problem of juvenile crime, see Katz, M., *Class, Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971), at pages 121-122. For accounts of the results of ventures which sought to carry out entirely the replacement of the home with the institution, see Katz, M., *The Irony of Early School*

Reform (Harv. Univ. Press, 1968) for a discussion of Horace Mann's New York Reform School, and Katz, M., *Class, Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971), at pages 45-47 for a discussion of the Massachusetts Reform School (which represented, in 1848, the first form of compulsory schooling in the United States).

For discussions of like efforts to force the acculturation of American Indian children, see Burnette, *The Tortured Americans* (Prentice Hall, N.Y., 1971) at pages 24, 25; and Schusky, *The Right to be Indian* (The Indian Historical Press, Inc., San Francisco, 1970) at pages 50, 51. One would think that the outcome of public school ventures to replace the home has been sufficiently grim, uniformly, to give pause to the most ardent advocates of forced acculturation:

> "Education is and has been a farce. The overriding purpose of education in years past was to separate the Indian child from his home and his heritage.
>
> * * * * *
>
> "The implications are clear to anyone who has undergone the educational experience on a reservation: Indian students, while they recognize the value of education, must, if they have any dignity or pride, resist the kind of training they are subjected to. * * * Added to these handicaps is the awareness that the goal of the school system fostered by the BIA is not education but acculturation. Never have I known one teacher in an Indian school or one BIA employee who troubled himself to learn the Sioux language or to acquaint himself with the cultural background of his students" (Burnette, *The Tortured Americans* (Prentice Hall, N.Y., 1971) pp. 24, 25).

Against views that see the solution to all social ills in an expanded public school system aimed at forced acculturation are arrayed other voices who see in the public school system itself an institution specifically designed to invade the mind and shape the personality, the greatest danger of all. The danger inherent in such an institution is magnified by the increased central direction which must follow inevitably upon the undermining of local school boards. Some wish to escape into alternative systems (*Wisconsin v. Yoder* (1972) 92 S.Ct. 1526; *Pierce v. Society of Sisters* (1925) 268 U.S. 510; *In the Matter of Skipwith* (Dom.Rel.Ct., 1958) 14 Misc.2d 325; 180 N.Y.S.2d 852). Others demand freedom within the system (*Meyer v. Nebraska* (1923) 262 U.S. 390; *Tinker v. Des Moines Ind. Com. School Dist.* (1969) 393 U.S. 503). Others see *choice* as the essence of the protection afforded not alone by *Yoder* and *Pierce* but by universal state statutory exemptions from public school attendance extended to pupils attending private and parochial schools. A benefit made available by the state to those who can pay is required by the Constitution to be extended to all by the equal protection doctrine of *Griffin v. Illinois* (1956) 351 U.S. 12. Choice, therefore, cannot constitutionally be restricted to those who can pay.

There are advocates of a voucher plan to make the choice among educational alternatives which are available to those who can afford private schools economically possible for the many. Notwithstanding *Griffin* (and notwithstanding the millions of "G.I. Bill" dollars spent at Baptist and other denominational colleges following World War II), versions of the voucher plan have al-

ready twice run afoul of lower Federal courts concerned at extending choice to the private expenditure of public funds at church supported schools (*Wolman v. Essex* (D.C.S.D. Ohio 1972) 40 Law Week 2724; *Lemon v. Sloan* (D.C.E.D. Pa. 1972) 340 F.Supp. 1356). If choice cannot be made available by indirect public support of alternative school systems, then choice must be made available within the system. Some regard the neighborhood school as offering choice. Some advocate programs such as Black House in Berkeley and its counterpart in Washington, D.C., to make radically different choices available, including in Washington, D.C., the introduction by direct public subsidy of religious fervor if not religion itself into the promotion of racial and cultural identity (see Gross and Osterman, *High School* (Simon & Schuster, N.Y., 1971) pp. 285, 301).

Some have lost the faith. They advocate no school at all: See Illich, *DeSchooling Society* (Harper & Row, N.Y., 1971); Reimer, *School is Dead* (Doubleday & Co., Inc., N.Y., 1971; cf. Whitehead, *The Aims of Education* (Mentor Pub. Co., N.Y., 1929). Even this Court has recognized that neither graduation certificates nor tests devised by psychologists are fair measures of ability (*Griggs v. Duke Power Co.* (1971) 401 U.S. 424).

Still others suggest a realistic appraisal of what formal schools can and cannot do and a sensible limit to the aims of public education: ". . . [P]eople ask no more of schools today than they did a hundred and twenty-five years ago. Even then the schools were asked to do the impossible . . . stop crime and check immorality by teaching obedience. . . . [R]eformers

should begin to distinguish between what formal schooling can and cannot do. They must separate the teaching of skills from the teaching of attitudes, and concentrate on the former. . . . [I]t is of course impossible to separate the two. . . . But there is a vast difference between leaving the formation of attitudes untended and making them the object of education. This is a radical position, despite the ordinary presumption to the contrary" (Katz, M., *Class, Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971) pp. 141, 142).

A school board may reasonably question the notion that equality of result can measure equality of opportunity. It may reasonably question the notion that a median can fairly be used to compare one racially defined group with another for the purpose of deducing group opportunity from tests given to individuals. *Individual* opportunities not *group* opportunity was specified in the Civil Rights Act of 1964, as indeed the Fourteenth Amendment itself requires. The use by the District Court below of a definition of "equal educational opportunity" as "equality of educational outcome" by group was not consistent with judicial obligation to the person under the Fourteenth Amendment. Theories of education are pertinent to educational debate but they often serve chiefly to obscure the problem facing the teacher just as they obscure the legal problem facing this Court. When teachers teach, they do not teach a group. They teach a person. It is the person not a group which the Fourteenth Amendment assigns to this Court the duty to protect. There is no conflict between the requirements of teaching and the requirements of the Constitution.

D. "Equal educational opportunity" affords no standard for measurement of a school district's performance of its constitutional duty.

In light of all the learning published by educators, sociologists, psychologists, philosophers, and concerned laymen it is tempting to adopt Edmund Gordon's definition of "equal educational opportunity" which is no definition at all: "Equalization of educational opportunity in a democracy requires parity in achievement at a baseline corresponding to the level required for social satisfaction and democratic participation. It also demands opportunity and freedom to vary with respect to achievement ceilings" (Mosteller, op.cit. supra, p. 433). Satisfying as this may be to today's thoughtful educational theorist, it provides no guide to courts. If an output advocate such as Dr. Coleman arrives first with conflicting strands of current educational theory seductively interwoven to promote heterogeneous ability grouping as a constitutional requirement, then socio-economic "integration" or an "easily measurable" incongruent substitute—race—is to be decreed. If an input advocate arrives first, then additional expenditures or compensatory education programs are to be decreed. If a John Dewey arrives again at the doorstep (if he has not then been foreclosed), then individual instruction is to be decreed. The "opportunities" will still vary, but not by the exercise of choice and self-selection within the framework of local school district judgments. They will vary by operation of the decrees of Federal courts.

If a proportion of Negro pupils in each classroom is the constitutional right of every white child, and a proportion of white pupils is the constitutional right of every

Negro child, it is difficult to see how this right can be realized short of chartering a fleet of airplanes. It is impossible to provide the national statistical averages in many cities now or in the foreseeable future. Such impossibilities cannot be the basis for a constitutional duty. Requiring a fair share of everyone available necessarily results in a different "opportunity" from school district to school district, just as in-district variations now provide different "opportunities." There can be no real "equalization" (see Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined* (1968) 35 Univ. of Chicago L.Rev. 583, 596-598).

No one seeks an "equal" opportunity for his child. He seeks the "best" within the constraints of his individual circumstances. For one child, this may be in a highly competitive, high achieving classroom (U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (U.S. Gov't Printing Office, 1967) at pp. 102-103). For another, this same situation may be a disaster. See Dennison, *The Lives of Children* (Vintage Books, N.Y., 1969) for accounts of children damaged by conventionally structured schools, and a persuasive argument against the trend toward larger and more impersonal educational units. Some send their children to parochial schools; for others, watching children being released for religious training is damaging (see *Illinois ex rel. McCollum v. Board of Education* (1948) 333 U.S. 203). The compulsion to seek and find what seems best is universal, and, to most, unrelated to the color of the children:

> "* * * theoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is

no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile opinion, and no teaching concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things are seldom equal, and in that case, Sympathy, Knowledge and the Truth, outweigh all that the mixed school can offer" (W.E.B. DuBois, *Does the Negro Need Separate Schools* (Journal of Negro Education, July, 1935) p. 335; reprinted in Myrdal, *An American Dilemma* (Harper Bros., N.Y. 1944) p. 902).

"Equal educational opportunity" affords no standard for the measurement of a school district's performance of its duty. It affords no standard against which courts or school districts may presently measure fair treatment of the person. It is a slogan which reflects a great public controversy about the purpose and effect of public schools, a controversy which at bottom is not justiciable. That controversy should not be resolved by the happenstance of which educational theory or which mix of theories is first pressed upon this Court. It should not be resolved by the happenstance of which theory or which mix appeals to one lower court but not to another. It should be resolved by allowing local school boards democratically to exercise their function, for the Constitution can carry only so much excess baggage. It is not fitting that the political-sociological concept of an "equal educational opportu-

nity" should transform Federal courts into ex-officio school boards meeting at irregular intervals. The Constitution assigns to Federal courts no such task. Courts, moreover, must be sure footed. No educational theory advanced as an alternative standard for pupil assignment to schools achieves the stability which should be reflected in fundamental constitutional principle. Such theories are made no more digestible by throwing them all into one pot to make some kind of jumble stew. (Pl.Br., pp. 103, 104). Neither the problems of educational policy nor the problems of reducing racial hostility are likely to yield either to such culinary arts or to the court-ordered solutions which sometimes result (see Schoettle, *The Equal Protection Clause in Public Education* (1972) 71 Colum. L.Rev. 1355).

II. A NEIGHBORHOOD SCHOOL POLICY IS A REASONABLE LEGISLATIVE POLICY. IT IS A REASONABLE COMPROMISE OF CONFLICTING DEMANDS AND COMPETING CONSIDERATIONS OF EDUCATIONAL POLICY, A GOVERNMENTAL FUNCTION BEST PERFORMED BY LEGISLATIVE BODIES AND NOT BY COURTS.

The claims of the Denver School District and the State of Colorado to a compelling interest in a neighborhood school policy are at least as persuasive as are the claims of plaintiffs on behalf of a racially defined group to a racially measured benefit from pupil assignment by race. When one considers the variety of conflicting standards which class action plaintiffs would today have judges substitute for geographic proximity as the basis for pupil assignment to schools, it is not difficult to see why a policy of pupil assignment based solely upon geographic

proximity was adopted in the first place. It is not difficult to see why it has in some instances been adhered to tenaciously. If a school board were obliged to take everyone's advice, it would likely join Mr. Illich[7] in the view that the best decision would be not to have schools (see Aesop, *The Miller, His Son, and Their Donkey* (Aesop's Fables, Grosset and Dunlap, 1947) p. 50 et seq.). A neighborhood school policy is a reasonable legislative compromise of competing policy considerations.

A. Denver's policy meets expectations long established.

Denver's neighborhood school policy is more than an administrative convenience. It enjoys the presumption that attaches to all legislation not on its face discriminatory, by race, by economic circumstances, or by length of residence. It meets the expectations which often attach to long standing policies (cf. *Perry v. Sindermann* (1972) ___ S.Ct. ___). It therefore enjoys the values of precedent which attach to such policies. To deny to today's urban minorities an amenity of urban living allowed by the greater density in urban than in rural areas would deny to today's urban dwellers an amenity available to others in the past. To deny to the minorities which populate many cities today the political influence over local school district legislative and administrative policies available to yesterday's urban dwellers would deny to today's urban dwellers a fundamental right also enjoyed by others in the past. Today's and tomorrow's urban dwellers—of all colors and persuasions—are as entitled to

[7]Illich, *DeSchooling Society* (Harper & Row, N.Y., 1971).

an equal political opportunity as to an equal educational opportunity.

Brown v. Board of Education, supra, was but one instance of a broad purpose pursued by this Court in other cases. Racial classifications are not the only suspect classifications. This Court has persistently struck down state laws and practices discriminatory against newcomers. The right to change one's residence has become a fundamental right by virtue of constitutionally required removal of disabilities upon newcomers: A state may not exclude indigents (*Edwards v. California* (1941) 314 U.S. 160). A state must apply to newcomers the same standards as it applies to others for welfare qualification (*Shapiro v. Thompson* (1969) 394 U.S. 618). A state may not exclude newcomers from the voting franchise (*Dunn v. Blumstein* (1972) 92 S.Ct. 995).

When a state may not discriminate against newcomers, a fortiori it may not discriminate against some newcomers on account of their race. A state may not countenance in its judicial processes the use of racial classifications to exclude newcomers from housing opportunities (*Shelley v. Kraemer* (1948) 334 U.S. 1; *Barrows v. Jackson* (1953) 346 U.S. 249). A state may not place upon its legislative processes disabilities which would preclude altogether participation by state and local legislative bodies in efforts to increase housing opportunities available to newcomers. (*Reitman v. Mulkey* (1967) 387 U.S. 369; *Hunter v. Erickson* (1969) 393 U.S. 385).

These cases do not, as plaintiffs suggest (Pl.Br., p. 108), imply that a constitutional requirement of proportionate

inclusion by race follows from a policy forbidding the deliberate exclusion of newcomers. The Constitution no more requires the assignment of residential billets by race than it requires a state to issue marriage licenses only to racially mixed couples by virtue of *Loving v. Virginia* (1967) 388 U.S. 1 (cf. Bittker, *Case of the Checker-board Ordinance*, (1962) 71 Yale L.J. 1387). *Reitman* and *Hunter* do not imply that a state must legislate in some particular manner, nor do they imply that a state may allow no personal rights to exist under its laws. *Reitman* and *Hunter* entailed the balancing of the nation's interest in freedom of population movements against private interest in rental property and property after it has been sold. A man's interest in rental property is ordinarily commercial and his interest in any property after he has sold it is tenuous. A man's interest in his children is seldom commercial. Nor does he customarily sell them. His interest is continuing, and is an interest at least as fundamental as having a beer with the boys (*Moose Lodge No. 107 v. Irvis* (1972) 92 S.Ct. 1965).

This Court has nowhere suggested that reasonable legislative policies applicable to all alike must be remade to accommodate newcomers. Nor has this Court suggested that any racially, ethnically, or economically defined group has standing to speak for all newcomers, those arriving tomorrow as well as those who arrived yesterday. On the contrary, this Court has held in a long line of cases that a state may not discriminate between newcomers and those already there. These cases imply that a drastic change in policy falling largely upon newcomers might by that effect alone offend the Constitu-

tion. Upon what principle, then, is Denver to be precluded from offering to newcomers to its public school system the same services and privileges and political franchise afforded to those who came before?

That all are entitled to an equal political opportunity lies at the heart of *Baker v. Carr* (1962) 369 U.S. 186. The breakdown of local communities and local political boundaries attendant upon mandatory racial balance strikes at the heart of the political franchise which that case and its progeny sought to insure for all alike, irrespective of race. Small wonder that some regard "busing" as merely another example of the maintenance of control by "whites" over "blacks" (see Knowles and Prewitt, *Institutional Racism in America* (Prentice Hall, N.Y., 1969) pp. 31-35).

B. The neighborhood school appears to enhance academic achievement, and it invites community participation as well.

There is some evidence that the neighborhood school is more likely than not to enhance academic achievement in the early grades, and that its perpetuation may be particularly important to Negro pupils. "Non-metropolitan" pupils who are traditionally transported to consolidated schools consistently achieve at a lower level in all subjects than do metropolitan students for all races and regions (Coleman Report, pp. 221-251; see also Mosteller, op.cit. supra, p. 374). Although there is considerable decline in the relative achievement of Negroes as compared to whites in all rural areas, there is "little or no decline" in the northeast, midwest or west metropolitan areas (Coleman Report, p. 220), areas which have traditionally maintained neighborhood schools.

In addition, the neighborhood school has in many cities become the focus for small scale neighborhood community activity, tangential to direct instruction of pupils. The neighborhood school is often the focus for family community involvement, in activities such as the PTA, candidates' nights for local elections, boy scouts, the recycling of tin cans and bottles for "ecological" purposes, community bazaars, and many other activities in which people like to engage collectively on a small scale. Such activities need not extend to "local control" and the type of cataclysmic controversy which this twentieth century version of democratic localism can create (compare Mayer, *The Teachers Strike: New York, 1968* (Harper & Row, N.Y., 1969) and Levine, *Ocean Hill-Brownsville: Schools in Crisis* (Popular Library, N.Y., (1969) with Katz, M., *Class Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971) pp. 15-22, 127-128). The neighborhood school affords a means and a degree of participation and local community involvement which tends to meet the needs manifest in controversies such as *Ocean Hill-Brownsville*, without their disruptive effects.

C. A neighborhood school policy excludes no person on account of his race. Its abandonment is more likely than not to contribute to greater geographic separation of racially defined populations, and to an adverse effect upon schools available to the poor and disadvantaged as well.

People move for a great many reasons having nothing to do with the race of their neighbors, the race of their children's classmates, or the race of their children's playmates. Moving sometimes amounts to a vote with the feet, but population movements are complex phenomena. The

notion that racially homogeneous neighborhoods, when they occur, result from "white" flight is often mistaken. The dimension of the migration of Southern rural Negroes into both Southern and Northern cities belies any such simplistic explanations as either "black flight" or "white flight." Migrating populations homogeneous as to social and economic class sometimes exert a "pushing effect" upon Negroes and whites alike (see Simpson and Yinger, *Racial and Cultural Minorities* (3rd Ed.) (Harper & Row, N.Y., 1965) at p. 330: "[T]he newer Negro families were of a lower socio-economic level. Both the Negro and the white families who had supported the interracial school and neighborhood began to move out").

The migration of populations is not the only phenomenon with a pushing effect. Many cities have become familiar with the pushing effect of redevelopment which has too frequently used the power of eminent domain to produce high-cost housing unsuitable for family living or beyond the means of parents. Often, shifts in racial and class demographic patterns are not so much a matter of people moving out as of which people move in.

Neither the massive Negro migration into cities nor urban redevelopment are the last contributors to shifts in demographic patterns which will affect the racial and class patterns of urban areas.[76] San Francisco, for example, is experiencing a dramatic growth in the number of immigrants of Chinese ancestry. These immigrants tend to

[76]For a description of the changed proportions by national origin of today's immigration resulting from removal of the national origins quota system in 1965, see Andersson and Boyer, *Bilingual Schooling in the United States* (Southwest Educ. Dev. Lab., U.S. Gov't Printing Office, Wash. D.C. 1970) Vol. II, pp. 60-61.

flow into neighborhoods long occupied primarily by families of Chinese ancestry. This is occurring at the same time as the descendants of earlier residents are moving out, dispersing themselves throughout the city. Similarly, San Francisco is experiencing a dramatic growth in Filipino immigration. Filipino immigration alone had the effect of reducing the Negro proportion in one San Francisco elementary school from forty-five to nineteen over a five-year period.

All such migrations place great demands upon a city's housing supply and contribute to increased density. One reason people move is that they have been educated, in part by public policy, to maximize consumption. Housing is one means, indeed the chief means, of consumption. Schools are another. As city amenities such as neighborhood schools diminish, the displacement of residents to suburbia is accelerated, particularly among those whose values are least compatible with increased density and most compatible with mowing the lawn on Saturday morning. Most cities have experienced such population turnovers several times since the nineteenth century. A few cities seem to be experiencing it for the first time.

All experience to date points to but one overall result for the public school in the city: affluent families withdraw from the school system, either for the suburbs or for private schools. The effect upon the public school system is to increase the proportion of the immigrant poor of all races. Unless plaintiffs' reliance upon Dr. Coleman is wholly misplaced, the predictable effect of the policy urged by plaintiffs upon the Denver School District would be to reduce the proportion of pupils who

tend to achieve at higher levels, and thereby reduce the proportion of such pupils available for the heterogeneous ability grouping which plaintiffs would like all school districts to pursue. That this predictable acceleration of population displacement actually occurs has been demonstrated time and time again, and quite recently in San Francisco. To the extent that the immigrant poor are over-represented among "racial" minorities the effect is to increase the "concentration" of racial minorities in city public school populations. The effect also, of course, is to conscript for "desegregation" on the basis of income.

A neighborhood school policy allows parents of all races to participate in the ethical choices involved in racial integration, but it does not allow to parents the freedom to choose among schools solely upon the basis of the race of its pupils. Neighborhood schools are not maintained by race. To the extent that small attendance zones keyed to neighborhood schools afford freedom of choice predicated upon race, they burden choice as much as do larger attendance zones. Absent unusual circumstances, to attend a school in a neighborhood one must live there. To attend school elsewhere, one must move. Larger attendance zones offer to people the same choice about the race and social class of their children's classmates as do neighborhood schools, but they encourage people to move for other reasons as well. Larger attendance zones mean only that to the extent allowing choice is the cause of racial imbalance, people move farther and cities integrated—whether by race or by social class—thereby become more difficult to achieve.

D. At worst, the neighborhood school is a mild form of pluralism, pluralism which is constitutionally protected in its more extreme forms.

Consensus about the forms and effects of authoritarian structures appears to be dissolving at the same time as belief in the effectiveness of public schools to create entirely new forms of human beings appears to be increasing. This tension between the images of the school as culture-destroyer and the school as savior has always been felt in immigrant groups. It is now felt among the black and the poor (see Coles, *The South Goes North* (Little, Brown & Co., Boston, 1971) p. 591). As in the past, the public school aspires to assimilation (Bickel, *The Supreme Court and the Idea of Progress* (Harper & Row, N.Y., 1970) pp. 115-151). But today the question has become "assimilation into what?" and the virtues of pluralism have been noted (see Glazer and Moynihan, *Beyond the Melting Pot* (MIT Press, Cambridge, Mass., 1963); see also MALDEF Brief, p. 26). Pluralism, moreover, may be the heart of the city (Jacobs, *The Death and Life of Great American Cities* (Random House, N.Y., 1961).

Pluralism has found shelter in the Constitution. Pluralism has found shelter in protected schools (*Pierce v. Society of Sisters* (1925) 268 U.S. 510), in protected activities (*Tinker v. Des Moines Ind. Com. School Dist.* (1969) 393 U.S. 506), and most recently in protected cultures (*Wisconsin v. Yoder* (1972) 92 S.Ct. 1526). The right of the person to enjoy this sort of pluralism is regarded as so fundamental as to have its exercise a constitutional right. Yet the mild form of pluralism repre-

sented by the neighborhood school is regarded by some as so malevolent as to require its destruction by constitutional mandate. Its malevolent nature is considered an outcome of city neighborhoods where like-minded people with the same incomes, educational levels and color are assumed to cluster together to avoid contact with a larger world which is assumed to be uniformly white and middle-class. This is the same image that many urban dwellers have of suburbia, except that the larger world which the suburbanite is supposed to be avoiding is assumed to be racially and economically mixed, as well as cosmopolitan. When a city has diverse elements in its population, the neighborhood is considered confining and destructive (see, e.g., Dodson, *Education and the Powerless* in Passow, ed., *Developing Programs for the Educationally Disadvantaged*, Teacher's College Press, Colum. Univ., 1968) p. 332). When the city becomes uniform, at least as to its public school population, the entire city acquires a confining and destructive image. The thrust then is toward amalgamation of school districts.

These images are not new. Neither is the use of such images by some representatives of the institution of the public school to render politically impotent those who are supposed to be the institution's beneficiaries (see Katz, M., *The Irony of Early School Reform* (Harv. Univ. Press, 1968) p. 213, et. seq.; Schusky, *The Right to be Indian*, (The Indian Historical Press, Inc., San Francisco, 1970) at pp. 50-52). The institutional response to the spectre of parental participation in schools—indeed, participation by anyone deemed "educationally conservative"—in ways not institutionally approved is sometimes spectacular (see,

e.g., Cremin, op. cit. supra, at pp. 341-343; Urofsky, ed. *Why Teachers Strike: Teachers' Rights and Community Control* (Doubleday & Co., N.Y., 1970) esp. p. 18).

In the case at bar the conversion into impotence of a political opportunity to reform a small part of the institution of American public education is again threatened by attack upon a democratically chosen local school board. It is easier to influence the climate in a school in one's neighborhood than the climate in a school located elsewhere. It is more difficult to influence a school with no easily ascertainable attendance zone. It is impossible to influence a school with a massive clientele, or a school run from the Federal courthouse or from the District of Columbia. These obvious facts are overlooked and it is the neighborhood school which becomes a monster that creates "feelings of low self esteem, political impotence, isolation and inferiority, both in the minority children and their parents." (Pl.Br., p. 103). One of the conclusions of the Coleman Report, that both Negro and white children expressed a high self-concept, as well as a high interest in school and learning compared to other groups, is overlooked (Coleman Report, pp. 280, 281, 319). Instead, the portion seized upon is that Negroes were like other minority groups in "expressing a much lower sense of control of the environment than whites" (Ibid., p. 319). In the same manner, Dr. Dodson concluded that the factors present in the neighborhood school "combine to teach these children of the minority that they are powerless people and consequently as all people tend to do when they feel powerless, they resign in apathy * * *" (A.1474a; Dodson, op.cit. supra, p. 332).

One might more reasonably conclude that no one has any choice but to resign in apathy from an institution whose professional political representatives are so adept as to use justified feelings of impotence in dealing with the institution to make sure that all who must deal with it will remain impotent. In a paper published in 1930, retracting the conclusions of a study published in 1923 making comparisons between racial and ethnic groups based on Army Alpha scores in World War I, Brigham cautioned: "A safe procedure is to disregard what a psychologist calls his test, and to study the test itself as an instrument more or less adequate to its purpose. Most psychologists working in the test field have been guilty of a *naming fallacy* which easily enables them to slide mysteriously from the score in the test to the hypothetical faculty suggested by the name given to the test" (Brigham, *Intelligence Tests of Immigrant Groups* (1930), 37 Psych. Rev. 158, reprinted in Jenkins and Paterson, *Studies in Individual Differences: The Search for Intelligence* (Appleton-Century-Crofts, Inc., N.Y. 1961) pp. 285, 286). Dr. Coleman's "sense of control of environment" test was based upon the responses (agree or disagree) to three statements: "good luck is more important than hard work for success"; "every time I try to get ahead, something or someone stops me"; and "people like me don't have much of a chance to be successful in life" (Coleman Report, p. 320). The responses to the first question correlated dramatically with achievement scores (Ibid., p. 323). Perhaps only the iconoclast would wonder whether those who perceive that the rain falls on the just and the unjust or those who have Hora-

tio Alger programmed into their personality have the greater "sense of control of environment." One thing is certain: if the opportunities for influence in the real world are decreased, one's "sense of control" *should* be impaired. Some interpret "majority schools"—predominantly white schools—in that light (see Knowles and Prewitt, *Institutional Racism in America* (Prentice-Hall, Inc., N.Y., 1969) pp. 32-35, 44-45).

One need not look to the weaknesses in psychological testing for an explanation of Dr. Dodson's selective perception of the neighborhood school. Dr. Dodson has made it quite clear elsewhere that he is bent upon the destruction of local government and the neighborhood school simply as a means of "inducing dysfunction into the system"—referring, of course, only to the local school system—and co-opting for the institutional politician the positive aspects of "black power." He does not expect to further racial integration. His object is to administer the therapy offered by self-assertion, by asserting himself on behalf of those who need self-assertion to overcome feelings of powerlessness. See Dodson, *Education and the Powerless* in Passow, ed., *Developing Programs for the Educationally Disadvantaged* (Teacher's College Press, Colum. Univ., 1968):

> "Today the sociologists are coming up very rapidly with their version [of] infant damnation. When one is through reading our 'verified hypothesis,' he feels like saying 'For God's sake, if this is all we see in the human potential with which we work, we had better turn them over to the Black Muslims and resign from the business.' Somehow when youths get

a dose of that ideology, and take power, they show considerable intelligence, and ability" (Ibid., 334).

"The alternative to this so-called integration approach resides in the Negro group itself taking power and moving under self-direction * * *. This approach calls for conflict * * *. This does not necessarily mean violence. It means inducing dysfunction into the system * * * until the social order comes to recognize the interdependency of the whole to its parts" (Ibid., p. 338).

"Negroes must learn the art and skill of taking power—as they rapidly are doing" (Ibid., p. 338).

"Every classroom should be a laboratory in how to take power, how to shield the group from power which is abused * * *" (Ibid., p. 339).

A school board may reasonably doubt that operating classrooms as laboratories in which to teach pupils how to take power by racially defined groups will reduce racial friction and hostility in integrated or in any other classrooms. A school board may reasonably consider its duty to be to provide an education for all rather than to engage in restructuring government along racial lines. It is not reasonable to predicate Federal jurisdiction upon a school board's unwillingness deliberately to create "dysfunction" in a local public school system so that some of its constituency will feel that they have been able to assert themselves.

II. A neighborhood school policy does not disrupt parental expectations either as to the justification for compulsory education or as to choice among schools.

Parents and their children have claims upon the institution of the public school as legitimate as those of sociologists, educational theorists, institutional politicians, school district lobbying associations, teachers' colleges, school administrators' associations, teachers' unions, and racially defined pressure groups. It is reasonable for a local school board to take parental claims into account. The rights of parents serve a purpose beyond recognition of the natural feelings of parents for their children. We have in the Nazi and Fascist regimes the clear historical lesson of the result of law under which children belonged to the state. See, e.g., *Decision of the Vormundschaftsgericht*, Frankfurt Am Main-Hochst, Germany, May 4, 1937, 7 Deutsches Recht 446 (1937), translated in Simpson & Stone, *Law and Society* (West Pub. Co., 1949), at p. 1874; see also *Decision of the Amsgericht*, Wilster, Germany, Feb. 26, 1938 (67 Juristische Wochenschrift, 1938), translated in Simpson & Stone, *Law and Society*, at p. 1264: "• • • one of the boys expressed his desire to enter the Hitler Youth. But his parents would not allow it. From these facts the Court has concluded that B. is abusing his right of custody over his children and endangering their spiritual welfare. Therefore the Court has decided to deprive him of his right of custody • • •."

This Court recognized in *Wisconsin v. Yoder* (1972) 92 S.Ct. 1526 that the rights of parents are essential to the preservation of a free society. Most parents of all races

prefer the neighborhood school.[8] This preference is based in part upon its convenience, and the parental supervision which such convenience allows. It is also based in part upon the fact that the abandonment of the neighborhood school is advanced by some as a moral duty. Many parents regard the moral and ethical instruction of their children as the highest moral duty of parents. They do not regard such instruction as the proper function of the state. They are not willing to yield to the state the moral instruction of their children merely because some parents as well as some schools fall short in performing their obligations. Few parents regard the institution of the public school as Jehovah; fewer have the faith of Abraham (compare The Holy Bible, King James Trans., Genesis, c. 22, with Fiss, *A Theory of Fair Employment Laws* (1971) 38 Univ. of Chicago L.Rev. 235, 248-249, and with Cong. Record, Senate, Feb. 23, 1972, pp. S. 2380, 2381). Many parents have had experience in competing with state agencies in moral instruction of their children, and are therefore particularly sensitive to plans which lengthen school days without, in the parental view, compensating benefits (cf. *Wisconsin v. Yoder* (1972) 92 S. Ct. 1526; *West Virginia Board of Ed. v. Barnette* (1943) 319 U.S. 624;

[8]According to a Gallup poll on "busing to achieve desegregation" reported in Havemann, *Report*, National Journal, No. 16 at p. 632 (Wash., D.C., Apr. 15, 1972), 15% of the "whites" are in favor, 79% are opposed, with 6% having no opinion; 45% of the "blacks" are in favor, 47% are opposed with 8% having no opinion. Cf. A. 1015-1016 regarding a similar poll of affected parents in Denver. Obviously such polls are not helpful except to suggest that opinion about "busing" does not divide along racial lines. That polls show a policy to be favored by most does not make a policy right. It does not make it wrong either, for right and wrong are matters of individual thought and conscience. A poll measures neither.

Engel v. Vitale (1962) 370 U.S. 421). Travel time has been a source of controversy at least since 1902 (Smith, *Pupil Transportation: A Brief History* (1972) 11 Inequality in Education 6). Upon the evidence that it is after all the home which produces the school's chief "learning resources" parents would seem to have the better claim.

Many parents do not readily accept the notion that the law requires that they be afforded due process before their television set can be repossessed, but forbids that they be afforded an effective say, individually or collectively, in where, or for how long, or for what purpose their children are to be required to attend school (compare *Blair v. Pitchess* (1971) 53 Cal.3d 258 with *San Francisco Unified School District v. Johnson* (1971) 3 Cal. 3d 937). Such law has little moral force.

The success of compulsory education, if it has been successful, does not lie in the legal sanctions which can be brought to bear upon recalcitrant parents. The success of compulsory education lies in parental consensus, parental willingness to assign instruction to public schools. That consensus derives its moral force from the justification for compulsory education: a child is required to attend school for his own benefit. A shift to justifying compulsory education not upon the benefit to the child but upon the benefit to be derived by another from his presence, accompanied at the same time by increased burdens and loss of expectations, is highly disruptive of the delicate balance between the interest of the parent and the interest of the state in the instruction of the child. The person to benefit from the child's

presence may not be a classmate. It may be a teacher who does not wish to change *his* school assignment, a school administrator who wishes to shield himself from criticism based on low median achievement scores, or one or more political organizations who wish to enhance their prestige among "racial" or "professional" factions. In such circumstances the disruption attendant upon abandonment of the neighborhood school is quite likely to be accompanied by acrimony and an outright refusal of parental cooperation.

Acrimony is merely heightened by the easy tendency to characterize legitimate parental concerns as expressions of racial bigotry. The abandonment of the neighborhood school has frequently been grounded not in any firm knowledge of what will or will not benefit this or that racially defined group but simply in a desire to symbolize goodwill by the tender of someone else's child, or in a desire to administer some kind of mass therapy by constitutional mandate. A school board may reasonably doubt that such claims can be sufficient to justify disruption of a balance predicated by parents upon natural law within the penumbra of fundamental rights guaranteed by the First Amendment. A local school board's democratic recognition of parental claims should be afforded great weight.

III. THE RACIAL STANDARD FOR PUPIL ASSIGNMENT WHICH PLAINTIFFS URGE IS A SUSPECT STANDARD. MOREOVER, REQUIRING ITS USE IN A MULTI-RACIAL AND MULTI-ETHNIC COMMUNITY MAY RESULT IN A DENIAL OF EQUAL PROTECTION AND A DENIAL OF DUE PROCESS OF LAW TO SOME MINORITY PERSONS WHO ARE NOT "NEGRO," "HISPANO," "CHICANO" OR "ANGLO" AND TO SOME "NEGROES," "HISPANOS," "CHICANOS" AND ANGLOS" AS WELL.

A. Racial classification is a suspect if not illegal standard for the assignment by government of benefits and burdens.

Plaintiffs set against Denver's racially non-discriminatory pupil assignment policy the most suspect of the several conflicting standards by which courts are being asked to mandate the assignment of pupils, the race of the pupils. Prior to *Brown v. Board of Education*, racial classification by government could be used to intern American citizens solely because of their racial ancestry, for racial classifications were merely "suspect" (*Korematsu v. United States* (1944) 323 U.S. 214.) *Sweatt v. Painter* (1950) 339 U.S. 629 overruled *Plessy v. Ferguson* (1896) 163 U.S. 537 sub silentio. Until recently most were of the opinion that *Brown* similarly overruled *Korematsu* sub silentio, particularly in view of the emphasis in *Bolling v. Sharpe* (1954) 347 U.S. 497 upon the suspect nature of racial classifications. Some mistakes are too great and too fraught with implications to acknowledge publicly.[9] But the trouble with unacknowledged bastards is that they

---

[9]See Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (Univ. of Chicago Press, 1969); cf. Goebbels, *The Goebbels Diaries* (Lochner Trans., N.Y., 1948, Eagle Bks. Ed.) p. 176: "It's a life-and-death struggle between the Aryan race and the Jewish bacillus * * *. Fortunately, a whole series of possibilities presents itself for us in wartime that would be denied us in peacetime. We shall have to profit by this."

often surface, with followers, to claim the throne. Today, the calm confidence, the wisdom and the fairness of the relocation of American citizens because of their Japanese ancestry is to be acknowledged by using its principles to ends currently perceived by some as equally good (see *Hobson v. Hansen* (D.C. D.C. 1967) 269 F.Supp. 401[10]; *United States v. School District 151 of Cook County, Illinois* (D.C.N.D.Ill., E.D. 1969) 301 F.Supp. 201; *Developments in the Law—Equal Protection* (1969) 82 Harv. L.Rev. 1065, 1087; Wright, *Public School Desegregation: Legal Remedies for de facto Segregation* (1965) 40 N.Y.U.L.Rev. 285, 297). Racial classification is reasonable —indeed it is to be required—so long as its object is some expedient purpose of the moment.

If *Korematsu* still lives and racial classifications are merely suspect and not illegal, it would still be a surprise to find them required at the end of the road. To those who hailed *Brown* as the dawn of enlightenment about "race," it would be a surprise to find racial classifications required of school districts which have for many years operated and continue to operate "just schools." It is easy enough to see why racial classifications for the purpose of distributing state rights and obligations should be illegal per se. "Among the words that can be all things to all men, the word 'Race' has a fair claim to being the most common, the most ambiguous, and the most explosive" (Barzun, op.cit. supra, at p. 1).

---

[10]See also Hansen, *Danger in Washington: The Story of My Twenty Years in the Public Schools in the Nation's Capital* (Parker Pub. Co., N.Y., 1968).

At best, "race" is definable only with reference to the time, place and purpose of the definition. One normally has in mind a model of how one thinks others would define a particular race (Alexander and Alexander, *The New Racism* (1972) 9 San Diego L.Rev. 190, 198-203). The Alexanders' "model" points up the fact that local custom is critical to any effort to define the indicia of a "race." Every operating definition of "race" is a function of time and place as well as purpose (*Hernandez v. Texas* (1954) 347 U.S. 475). It was largely law establishing the classification, supportive of social custom, which gave "Negro" the core of meaning which it had. It is largely new interpretations of salutary laws forbidding racial discrimination, interpretations corroborating the premise of a passing social custom, which give "Negro" the core of meaning which it still has (see Banton, *Race Relations* (Basic Books, N.Y., 1967) pp. 300-303 on the effect of stereotypes as creating self-fulfilling prophecies).

If racial classifications are now to be constitutionally required legal classifications for the purpose of assigning children to public schools, plaintiffs should at a minimum be required to establish that the "Negro" classification has some meaning at the time and in the place in which the use of such a classification for pupil assignment is sought to be required. Plaintiffs have not done so. They have, on the contrary, established that "race" has been consistently considered immaterial by the Denver School District in its pupil assignment policies.

B. Non-discrimination is not discrimination; nor is it exclusion by race.

Plaintiffs argue that whether an act or policy is racially discriminatory must be determined not by its object but by its effect (e.g., Pl.Br., p. 114). Non-discrimination is to become discrimination by virtue of the effect of failure to discriminate among pupils by race. Plaintiffs thus stand upon its head the fundamental principle that one may not because of his race be treated by government differently than another.

When the benefit or burden of an act or policy falls cleanly upon one racially defined group and not at all upon another, the act or policy may be a denial of equal protection. The act or policy may be a denial of equal protection because the congruence of race and benefit or burden may itself demonstrate that the act or policy is arbitrary and capricious, for racial classifications are themselves arbitrary and capricious. These principles are easy to apply. A state may not require a permit for wooden laundry buildings and grant such permits only to Caucasians (*Yick Wo v. Hopkins* (1886) 118 U.S. 356). A railway company may not allot some dining car tables to white passengers and others to Negroes. Such quota systems are unlawful racial discrimination (*Henderson v. United States* (1950) 339 U.S. 816).

This Court has upon several occasions disclaimed approval of racial quotas in public schools, for racial quotas of pupils in schools are as likely to result in a revival of caste based upon racial indicia as in its complete demise.[10a]

[10a] Plaintiffs' confusion of "caste" with "class" (compare Pl.Br. at pp. 33 and 125 with pp. 39, 40) is comprehensible in the light of the considerable disagreement among sociologists as to whether

A racial quota is necessarily exclusionary as well as inclusionary in two ways: First, if to achieve and maintain the racial balance of a classroom of thirty pupils, a quota of fifteen black and fifteen white pupils is established, the quota includes only fifteen black pupils. It excludes all black pupils who exceed that number and who would, absent the limit, be in the classroom. Second, by including fifteen black pupils on the basis of race, fifteen white pupils are thereby excluded on the basis of race.

Since quotas are necessarily exclusionary as well as inclusionary, Denver can hardly be said to have violated a constitutional duty by declining to establish racial quotas. The establishment of racial quotas for schools and classrooms would be squarely contrary to *Brown's* prohibition against the exclusion of persons by race. Based as it has been and continues to be upon geographic standards alone, Denver has pursued faithfully the policy laid down by this Court. Denver's policy seeks to avoid deliberate exclusion by race. It seeks at the same time to avoid deliberate inclusion by race, for such deliberate inclusion necessarily entails deliberate exclusion by the same suspect standard. Yet the plaintiffs here urge in effect that what was unlawful racial discrimination when

---

"caste" and the rigidity and lack of mobility associated with it, ever had any application to the American Negro, Myrdal notwithstanding (see Simpson and Yinger, *Racial and Cultural Minorities* (3rd Ed.) Harper & Row, 1965) pp. 245-259). Strictly speaking, it would seem that the only groups in our society treated with caste-like rigidity are children, and (except for the very few who transcend the common fate by their attachment to the few remaining institutions in which age is venerated, or at least no disability) the elderly. "In the debate on the question whether or not there are castes in the United States it is well to remember that caste and class are not realities, essences, but concepts" (Ibid., at p. 245).

practiced by a railroad upon its passengers is required by the Constitution to be practiced by school districts upon the nation's children.

Plaintiffs argue in effect that *Brown's* prohibition of racial discrimination requires racial discrimination because Denver's non-discriminatory policy does not fall upon all alike. It does not, according to plaintiffs, fall upon all alike because the median level of achievement of Negro and "Hispano" pupils is less than the median achievement level of "Anglo" pupils. It does not, according to Dr. Dodson, fall upon all alike because black pupils, unlike white pupils, need the therapy to be afforded by his power to create dysfunction in another local school system. These are curious means by which to seek to benefit Negro pupils. They are also curious conclusions from the evidence offered by the Coleman Report and the record in the case at bar. The Coleman Report data shows, if anything, that the average pupil in the racial majority in any school tends to achieve better than the average pupil in the racial minority in that school (supra, at p. 21). The record in this case offers no achievement data in Denver by race. There is, therefore, no basis for concluding that it is the Negro or the Hispano pupils in Denver's minority-dominated schools who are adversely affecting the school's average achievement level. Evidently, the District Court considered "Hispanos" to be as "knowledgeable" as "Anglos."

Plaintiffs reach their conclusion by a circular chain of reasoning: The Denver schools in which Negro and Hispano pupils predominate tend to have lower median achievement levels than do selected Denver schools in

which Anglo pupils predominate. Since Negro and Hispano pupils are disproportionately represented in the Denver schools with lower median achievement levels, it must be the Negro and Hispano pupils whose median achievement level in those schools is lower. Since Negro and Hispano pupils are in general as capable of performing as well as anyone else—an item with which we certainly agree—the Denver school district must be depriving its Negro and Hispano pupils of a benefit which the Denver School District is making available to its Anglo pupils. The only discernible such benefit is "knowledgeable fellow students", i.e., Anglo pupils.

This chain of reasoning assumes a great deal. It assumes that "Negroes" and "Hispanos" are fungible among the group defined as "Negro" and "Hispano." It assumes at the same time that "Anglos" are not fungible among the group defined as "Anglo", for one would otherwise suppose that the Anglo pupils in Denver's minority-dominated schools already provide "knowledgeable fellow students"; or, alternatively, it assumes that "Anglos" are also fungible but provided in insufficient numbers. It assumes either that it is the children and not the homes from which they come which generate learning, or that children from homes supportive of education are an adequate substitute for homes supportive of education.[10] It further assumes that it is possible for the Denver School District to provide an institutional substi-

[10] "Children from homes strongly supportive of education may not be influenced in achievement as much by variations in school factors as will children from homes not supportive of education (Coleman Report, p. 22).

tute for the home. How simple it would be if that were so!

There is an inherent limit upon the fungibility of institutions just as there is a limit upon the fungibility of people. The school cannot replace the home. There is also an inherent limit upon the effectiveness of social work and psychiatry remote from its intended beneficiaries. This Court observed in *Brown* that the deliberate exclusion of pupils by race does those excluded psychological harm. Indeed it does. One does not need Kenneth Clarke's experiment with several dolls and a few children to agree with that common sense proposition (Cahn, *Jurisprudence* (1955) 30 N.Y.U. Law Rev. 150, 161-165). That exclusion by race is an indignity to the pupil excluded—and an indignity also to those who identify with him—is well within the requirements for judicial notice. Plaintiffs, however, would construe this Court's just observation as having set aside the requirements of judicial notice to conclude, contrary to all evidence and experience, that "minority" children are more insulted than are "Anglos" by laws and practices which exclude pupils from schools because of their race (Pl.Br., pp. 103-104). That proposition is untenable.

Mistaken notions of racial superiority are but the counterpart of the mistaken self-perception of racial inferiority which this Court noted in *Brown*. Ideal self-perception is not easy to achieve, for "race pride" has positive as well as negative aspects (see Barzun, op. cit. supra., Pref. to 2d Ed. at p. xix). The psychological data offered in *Brown* is not universal today, if it ever was. It predated the rise of significant black nationalist

movements (see Essien-Udom, *Black Nationalism: A Search for Identity in America* (Univ. of Chicago Press, 1962) p. 5). It predated demands by some minority persons for racially oriented schools and studies, such as those in Berkeley, California, and Washington, D.C., from which whites (and in the case of Berkeley's *chicano* La Casa, Negroes) are excluded. It predated such contributions—presumably positive but in any event entitled to First Amendment free speech protection—as Donald W. Howie's unique analysis of *Brown* I: *The Image of Black People in Brown v. Board of Education* (1971) 1 The Black Law Journal 234.

One immediate effect of schools such as those in Berkeley and Washington, D.C., has been to condone by the support implicit in the use of Federal public funds the substitution of "black" attitudes of racial superiority for "white" (see, e.g., Gross and Osterman, *High School* (Simon & Schuster, N.Y., 1971), pp. 293, 300). The effect of allowing any racially defined group to exclude from public facilities persons of another race appears to be the same. If, therefore, the effect of Denver's neighborhood school policy were exclusion by race, which it is not, the burden of mistaken perception of *race* as determinative would not fall upon black and white pupils differently. It would fall upon both alike.

Not only does the effect of deliberate pupil exclusion by race fall alike and adversely upon black and white self-perception, but considering Negro pupils alone, the possible harm to self-perception which could result from the policies which plaintiffs in effect urge be required nationally may be as great as those resulting from segre-

gation laws and the deliberate exclusion by race which accompanied those laws. Self-perception is a tricky business, as the existence of the profession of psychiatry attests. We do not presume to guess about the self-perception of all Negro children or all of any-other-kind of children. The myths concerning Negroes of even thirty years ago seem absurd today (see Myrdal, op.cit. supra, pp. 106-108; cf. Barzun, op.cit. supra, passim). New myths tend to replace old myths (see Clark, *Dark Ghetto* (Harper & Row, N.Y., 1965) pp. 129-133, criticizing the current "cultural deprivation" theory; Erikson, *Identity, Youth and Crisis* (W. W. Norton & Company, N.Y., 1968) p. 304: "A clinician may be forgiven for questioning the restorative value of an excessive dose of moral zeal"; see also Murray, *The Omni-Americans: New Perspectives on Black Experience and American Culture* (Outerbridge & Dienstfrey, N.Y., (1970) pp. 98-112; Schragg, *Village School Downtown* (Beacon Press, Boston, 1967) pp. 171-172; and Katz, M., *Class, Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971) pp. 111-112).

A local school board may reasonably question whether a Negro or "Hispano" child's self-perception might in some instances be damaged by law and school district pupil assignment policies which tell him that too much association with those who live in his neighborhood will retard his intellectual development. It may well question whether a pupil assignment policy based upon an invidious and misleading statistical comparison of the median achievement level of one racially defined group with the median achievement level of another might damage the self-perception of some children.

Policy based upon such an invidious comparison would in any case serve to mark Negro pupils by race as members of a group from which not much can be expected. Plaintiffs themselves note that performance is sometimes affected by expectations (see Rosenthal and Jacobson, *Pygmalion in the Classroom: Teacher Expectation and Pupils' Intellectual Development* (Holt, Rhinehart and Winston, N.Y., 1968). Plaintiffs do not seek escape from the mechanism by which this effect sometimes occurs. They seek instead to reinforce it. Plaintiffs choose to ignore the likely effect of their own panacea upon expectations from Negro pupils. They complain instead about the long standing and almost universal practice of paying some attention to achievement levels *in schools* for the purpose of central decision making about the allocation of resources *to schools* (Pl.Br., pp. 33, 34).

In Denver, for example, a lower pupil-teacher ratio—that is, fewer pupils per teacher—was deliberately fostered in schools with lower average achievement (A. 1327a-1329a). It is difficult to see how such a practice can be considered adverse to the pupils in schools with lower average achievement levels; but the adverse effect of this practice, if it is adverse, does not fall upon Negro pupils alone. The vice of the practice, if it is a vice, stems from central direction. To the extent that the practice treats the pupil in a school with a lower average achievement level as a member of group, it does *by school* the very thing which plaintiffs seek to require be done *by race*. The effect upon Negro pupils of limited expectations would hardly be improved by a constitutional rule requiring the deliberate balancing of pupils by race on

the ground that as a racially defined group Negro pupils do not achieve well. Laws not only set standards but help to create habits of conformity to them.

C. It is reasonable for a school board to balance the harm likely to result from the adoption of a policy of pupil assignment by race against the harm which plaintiffs argue results from treating all pupils alike for the purpose of assignment to schools.

Brown v. Board of Education was addressed to the deliberate exclusion of one race by another in a subculture polarized bi-racially. The harm likely to result from abandonment of a racially neutral standard for pupil assignment in cosmopolitan and pluralistic communities, neither wholly separate nor wholly integrated, cannot be readily assessed. Courts are ill-equipped to make such assessments. A school board elected by the people must be sensitive to the wishes of those actually affected. It can at the same time accommodate better than can a court the process of compromise inherent in democratic formulation of policy.

When the Fourteenth Amendment is turned from a judicial shield into a legislative sword, neither the person nor the racially defined group enjoys any longer the sanctuary from legislative excess contemplated by judicial review. The tangible burden of departure from San Francisco's neighborhood school policy has fallen most heavily upon pupils of Chinese, Latin and Filipino ancestry, not because of contacts with Negroes in school, which is nothing new in San Francisco, but because of the effect of dispersal upon special programs which ethnic minorities often want and need (cf. MALDEF Br., p. 26). Many

pupils of Chinese, Latin and Filipino ancestry need bilingual instruction in public schools, a need having its origin not in ethnic background but in existing ethnic environment. Special programs are sometimes essential to assimilation of pupils into the larger community.

It borders upon the frivolous to argue as some have done in San Francisco, that all children can benefit from learning Chinese. It is doubtless true that many children other than those of Chinese ancestry could benefit from learning Chinese, just as they could benefit from learning Spanish, or Italian, or Greek, or Russian, or the first language of other bilingual groups in San Francisco. It does not, however, seem likely that the child from a Spanish speaking home, who is having difficulty with English, will be encouraged by burdening him with learning Chinese in the first grade. Moreover, teachers bilingual in Chinese and English are scarce. The voluntary "concentration" of young children whose first language is Chinese is sometimes the only way in which such children can be aided—voluntary "concentration" not because of racial or ethnic background but because of the need of a child for a particular educational benefit.

A neighborhood school policy is not segregation merely because it allows self-selection to create ethnic diversity among schools. Racially and ethnically diverse schools are equal and not separate, for racial imbalance resulting from self-selection excludes no one by racial or ethnic ancestry. Nor does it freeze more firmly into the institution of the public school the insensitivity often reflected in the nation's most centralized, longest standing

and least successful program of forced acculturation, that of American Indian children:

> "ITEM: The students in a sixth grade English class in a school on a Chippewa Indian reservation are all busily at work, writing a composition for Thanksgiving. The subject of the composition is written on the blackboard for the students (and the visitor) to see. The subject: 'Why We Are Happy the Pilgrims Came!'" (Silberman, *Crisis in the Classroom* (Random House, N.Y., 1970) p. 173).

Plaintiffs themselves recognize that a constitutional duty measured by "benefit" to Negroes alone is untenable, for they seek to dispose of all "Hispanos" as well. "Hispano" is not defined universally as plaintiffs suggest (Pl. Br., p. 5). Normally, "Hispano" means "native[s] or resident[s] of the southwestern United States descended from Spaniards settled there before annexation" (Webster's Third New International Dictionary (G. & C. Merriam Co., 1961)). "Hispano" is not equivalent to Mexican-American, Chicano, Latino, Puerto Rican or Spanish-speaking and/or Spanish surname any more than Anglo is the equivalent of Saxon. "These three names—'Mexican,' 'Spanish American,' and 'Latin American'—are the three designations about which there has been the greatest status battle. 'Mexican American' (with or without hyphen) is increasingly used * * *. In recent years, *chicano* (diminutive of *Mexicano*) has come into increasing use as a self-referent, notably among the young, and especially among the militent" (Grebler, Moore, and Guzman, *The Mexican American People* (The Free Press, N.Y., 1970) p. 386; see also Ibid., Table 16-2 *Self-designation in Spanish and English*, by Income, Los Angeles and San Antonio Survey Re-

spondents 1965-1966; and Ibid., pp. 601-604 for a history of the changes in census designations).

Admiral Farragut might fairly have called himself a "Spanish-American" (Roosevelt, Theo., *Fear God and Take Your Own Part* (George H. Doran Company, N.Y., 1916) p. 363). Self-designations often differ from labels applied by others. "To infer that all Hispanos are non-white is fallacious, malicious sometimes, and always unjustified .... The term 'Anglo' should always be used whenever it is necessary to differentiate between Americans of Spanish, Mexican or other Hispanic or Hispanic-Indian background and Americans of European background other than Spanish" (Valdes, *What You Are* (1972) 1 La Luz 56, 57). Some "Anglos" who identify with the Irish Free Republic would disagree, just as Dr. Valdes rightly protests: "In the same spirit that a Bolivian-American resents being called a Spanish-American or Mexican-American, so too do the one million descendants of the original Spanish colonizers resent being called Mexicans or Mexican-Americans ..." (Ibid., p. 58). The diminutive *chicano* has little application in Denver, where most "Hispanos" come from rural Colorado and northern New Mexico (A. 2002a).

In the absence of any evidence in the record as to its meaning as "used throughout the record" (Pl.Br., p. 5) or as to the indicia which are to govern a public official's placing a child in any such "racial" category for any operative purpose, "Hispano" is a vague classification. Since people often at least think they know what Negro means, plaintiffs try to do what *they* think best for all "Hispanos," and at the same time solve the vagueness inherent in the "Hispano" classification by pointing to one attribute—low

reading achievement scores—allegedly shared with Negroes. Plaintiffs are compelled to their peculiar effort to reclassify Hispanos for special treatment as Negroes by the necessity to impress a unique set of problems upon the "Negro" group. For when Negro and non-Negro groups share the same problems, the irrelevance of the Negro classification to pupil assignment to schools and classrooms becomes apparent. Classifications irrelevant to a valid purpose are certainly not to be required by the Fourteenth Amendment. Some feel they should be prohibited by it (cf. Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James* (1971) 69 Mich.L. Rev. 1259).

For the same reasons which motivate plaintiffs in the case at bar, there is a compulsion to widen the "Negro" group to include Mexican-Americans in Corpus Christi, Hispanos in Denver, Chinese in San Francisco, Puerto Ricans in New York and American Indians in Arizona. The only common problem shared by such groups in public schools is low average achievement scores on standard tests, although most pupils of Chinese ancestry in San Francisco do not share even that problem. The ultimate absurdity of plaintiffs' "racial" classification of "Negroes" is demonstrated by considering the fact that, among all racial groups, boys notoriously get lower grades in elementary schools than do girls. If plaintiffs' theory were correct, one should conclude that boys are suffering from a lack of equal educational opportunity in predominantly male classrooms. Should we then be required by the Constitution to balance boys with girls more closely? Or should we be required to reclassify boys for special treat-

ment as "Negroes?" Or should we be required to develop equations on the order of the Lorentz transformation by which we may weight Negroes, blacks, Chinese, Japanese, Mexicans, Filipinos, Samoans, boys, girls, Hispanos, Indians, Armenians, Italians, Germans, Russians and so on? And have we not already, by embarking upon racial classifications in schools, increased geometrically the opportunities for schoolmen who are inclined to do so to discriminate against a child because of his ancestry?

In San Francisco, these are not idle rhetorical questions. In San Francisco, the average scores on achievement tests among pupils of Chinese ancestry is high. Are pupils of Chinese ancestry, therefore, to be classified as "white" for the purpose of assignment to schools with "Negroes"?[11] Or must they be classified for school assignment as "Negro" by virtue of California laws which at one time excluded some of their ancestors (see *Guey Heung Lee v. Johnson* (1971) 404 U.S. 1215; Yankwich, *Social Attitudes as Reflected in Early California Law* (1959) 10 Hastings L.J. 250). Must San Francisco provide in each school (or in each classroom?) pupils in each of its nine "racial" classifications? Or is it San Francisco's constitutional duty to classify all of the low achievers among the pupils in its "racial" categories, taken together, for treatment as "Negroes" and all the high achievers for treatment as "white," and then to balance its schools so that each have an approximately equal proportion of high and low achievers?

---

[11] Americans of Chinese ancestry have waited long enough for an answer to this question (see *Gong Lum v. Rice* (1928) 275 U.S. 78).

Neither reason, nor science, nor anything in the record in the case at bar offers anything to justify any of such racial classifications as legally cognizable classifications for the assignment by the state of benefits or burdens. If children are to be required by the Constitution to be handicapped by public officials, children are entitled to be handicapped at least as fairly as horses. If we wish to address ourselves to slow learners and low achievers, we can address ourselves to slow learners and low achievers. That requires no *racial* classification.

IV. CONSTITUTIONAL STANDARDS AGAINST WHICH A PUBLIC BODY'S PERFORMANCE OF ITS CONSTITUTIONAL DUTY MAY BE MEASURED SHOULD NOT BE ABANDONED TO THE VARIED SUSCEPTIBILITIES OF LOWER COURTS TO CONCLUSIONARY SOCIOLOGICAL TESTIMONY AND REVANCHIST ESSAYS IN AMERICAN HISTORY.

The central question at the outset and at the end is whether it is the responsibility of the Denver School District to balance Denver's schools racially. Whether the question is posed as one of rights or of remedies, or as one of proof, disproof, or causation, that central question remains.

A. The remedies decisions in the school desegregation cases offer no ascertainable standard of constitutional duty.

Plaintiffs have shown only that the Denver School District has not considered itself obliged to abandon its long-standing policy of providing schools convenient to those whom the schools are to serve, in favor of assignment of pupils by race. Plaintiffs' charge that Denver's schools are insufficiently balanced racially requires at the outset a standard of a sufficient pattern, for a pattern of pupils by race cannot otherwise be insufficient.

The proper recipe for inclusion in and exclusion from specific schools to avoid "isolation" is entirely speculative. This Court's remedies decisions offer no standard of sufficiency better than that offered naturally by Denver's schools. Plaintiffs object to a school 27.5 per cent Anglo, 38 per cent Negro and 29.7 per cent Hispano (Pl.Br., p. 122). If interracial contact is the goal, this mix seems ideal. The "Anglo" percentage is greater than many cities can currently produce.

This Court's remedies decisions offer neither a measure from which one may deduce when "desegregation" has been accomplished nor a measure of sufficient racial patterns for any other purpose. "Desegregation" is to be measured not by motive but by effect. Yet school districts subject to "desegregation" are forbidden to create new attendance zones in which the proportion of pupils by race is about equal (*Wright v. Council of City of Emporia* (1972) ____S.Ct.____; *United States v. Scotland Neck City Board of Education* (1972) ____ S.Ct. ____). School districts subject to "desegregation" are thereby forbidden to reach for the "majority effect" which the plaintiffs in the case at bar consider to be vital to the improvement of Negro pupil achievement (supra, at p. 18). A school board's speculation about the effect upon shifts in racially defined populations of a Federal remedy which denies to all pupils in a school district the benefit of Dr. Coleman's prescription is not relevant. Yet judicial prognosis of the effect of population shifts upon the self-perception of all Negro pupils requires the perpetuation of a county-wide school system (*Wright v. Council of City of Emporia*, supra; *United*

States v. Scotland Neck City Board of Education, supra). The perpetuation of minority-dominated schools throughout an entire school district is required, for the creation of new attendance zones in which the proportion of white and black pupils would be about equal would have the effect of increasing the proportion of black pupils in some schools. Yet San Francisco was subjected to "desegregation" because it allowed some minority-dominated schools to exist within a framework of pupil assignment without regard to race, and San Francisco was allowed at the same time to increase the proportion of black pupils in some schools by minimizing them elsewhere.

One effect of this flexibility of equity has been to substitute asymmetry among school districts resulting from Federal court remedies decisions for asymmetry among school districts resulting from the legislative decisions of school districts alone. Another effect in San Francisco was the destruction of stable integrated elementary schools and the substitution for them of schools deliberately imbalanced racially in compliance with a Federal decree. Still another effect was to set San Francisco upon the long and divisive road of annual petitions and orders for further relief. The District Court's refusal to order San Francisco's elementary schools to be balanced evenly the first time assures Federal court supervision of San Francisco's pupil assignment policy in perpetuity, if "desegregation" remedies were at the outset correctly grounded in the understanding that racial imbalance is sufficient to show a violation of a constitutional duty conferring Federal jurisdiction.

If racial imbalance caused by the pupil assignment policy of a Federal District Court stands on some different footing than racial imbalance caused by the pupil assignment policy of a school district, one may reasonably ask what part of the Constitution exempts Federal court equity power from the requirements of equal protection and due process of law? What part of the Constitution allows to equity so much flexibility that Federal District Courts are always correct and school districts are always wrong? There is no end to the conundrums which Federal court remedies cases have put to school districts: Can they keep racial data without its being used as proof of racially discriminatory intent? Can they fail to keep racial data without its absence being used as proof of racially discriminatory intent? Can they build a new school, or not? Can they repair a school in a "predominantly black" neighborhood, or not? Can they assign a "black" teacher to a "black" school, or not? Can they allow a "white" child to transfer out of a "predominantly black" school for *any* reason? Can they meddle with the natural racial balance of a school attendance zone? If they do not strike the correct balance, will they then have committed an act of segregation by law? And what is the correct balance? Is it measured by pupil population in the school district, by adult population in the school district, or now, by pupil population or adult population in whatever three or more suburban areas someone might later think the school district should be required by the Constitution to merge with? If, on the other hand, they do not meddle with the racial balance of a school attendance zone, then are they guilty of an act of segregation by law, by virtue of "failure" to correct racial imbalance?

Uncertainty is compounded by the problem of the proper number of kinds: Two classifications as in *Racial Isolation in the Public Schools*?[12] Or six as in Denver? (A. 2038a). Or seven as in the Coleman Report? Or nine as in California? Uncertainty is further compounded by the recently enacted *Emergency School Aid Act*, Section 720 (9), (10). For the purpose of granting Federal aid to local school districts, Congress has determined that "minority isolation" consists of schools dominated by the aggregate of an open ended number of "racial minorities" (*Emergency School Aid Act*, Section 720 (9), (10).

As San Franciscans, we find the history of Denver's aborted plans for the creation of larger attendance zones by the use of "complexes" distinctly poignant. If innovations once adopted cannot be modified or postponed without thereby risking Federal court plenary authority in perpetuity over the school district, perhaps school districts will be more cautious in adopting innovations. Plaintiffs here argue that Denver's abandonment of its "complex" plan in favor of a plan allowing voluntary "majority to minority" pupil transfers was racially discriminatory (Pl.Br., p. 16). Yet neither the NAACP nor the District Court in San Francisco chose to abstain when San Francisco initiated the first stage of its like plan embracing roughly ten per cent of San Francisco's elementary schools and made clear its intention to adopt similar "complexes" throughout San Francisco (see *San Francisco Unified School District v. Johnson* (1971) 3 Cal.3d 937). San Francisco's "failure" to adopt quickly enough a city-wide plan of assignment of elementary pupils by

[12]U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (U.S. Gov't. Printing Office, 1967).

race was state action requiring a decree directing the adoption of a city-wide plan of assignment of elementary pupils by race.

How high, in short, is up? Those who seek in good faith responsibly to administer school districts by law and free of racial discrimination are damned if they do and damned if they don't. With school districts compelled to labor in the absence of rules, which is the absence of law, in a climate of racially oriented political propaganda, respect for law is itself undermined. School men who do wish to discriminate against pupils by race are afforded the best possible situations in which they may do so freely, for there is no measure by which the racist may be distinguished from the missionary.

B. Shifting to school districts the burden of disproving an intent to segregate merely affords another means to compel the adoption of racial quotas, a means suited chiefly to setting an equivocal constitutional standard against due process of law.

Plaintiffs would shift to local school districts the burden of disproof once an unspecified number of acts of "intentional segregation" have been shown (Pl.Br., p. 66). Given the evidence which plaintiffs offer as acts showing "intentional segregation" there would be little use in a requirement that some "segregatory action" be shown. Purity of heart is impossible to prove. Even Uncle Tom who gave his life rather than reveal the whereabouts of fugitive slaves became to some a symbol of black betrayal some while ago.

The natural and necessary actions of school districts —and that is all plaintiffs offer in this case—can easily be reinterpreted. If black teachers are assigned to pre-

dominantly black schools those schools are then said to be "identified" as "Negro" schools. If black teachers are assigned to "white" schools, then educational opportunities are being depressed at "black" schools because the children have no role models. If portable classrooms are located at a predominantly black school, that act becomes an effort to "contain" black students (App. to Pet. for Certiorari, 29a). If they are not, the educational opportunity is unequal because the pupils are then either in overcrowded classrooms or have an extended school day because they are transported elsewhere. If compensatory education programs are initiated, the accusation is that pupils are being "contained" in their old neighborhoods by the attractiveness of the school program. If compensatory education is not provided, pupils with a greater need are being discriminated against because they are not given more than children who need less. If a replacement school is built and opens with a twenty-seven percent Negro pupil population, it becomes "earmarked for minority occupants" (Pl.Br., p. 24). If school boundaries are drawn in a traditional fashion along a busy thoroughfare, then Negro pupils are being "segregated" if a disproportionate number live on one side of the street (1132a-1133a). And if school boundaries are drawn without regard to such a thoroughfare to include a greater proportion of Negro pupils in a school, then Negro pupils are being discriminated against because they must—unlike white pupils—cross a dangerous street or because such gerrymandering has included too few or too many.

Under this sort of Freudian analysis, the allocation of the burden of proof is dispositive. Constitutional rights and corresponding duties become mere matters of a

lower court's judgment at a given moment as to the sufficiency of the racial balance in a school district.

> "[I]n Detroit, one charge against the school board, accepted by Judge Roth, was that the board built small schools of 300 in order to contain the population and make desegregation more difficult. Paul Goodman and many others would argue that even schools of 300 are probably too large. In San Francisco, on the other hand, the argument was that schools were expanded to 'contain' the black and white population. The Detroit judge, it seems, would have preferred the large San Francisco schools, and the San Francisco judge would have preferred the small Detroit schools * * *" (Glazer, *Is Busing Necessary*, Commentary, March, 1972, 39, 48, reprinted in Cong. Record, Senate, March 13, 1972, S-3855, 3860).

Constitutional rights and corresponding duties should not depend upon the views of a single judge as to a sufficient pattern of pupil assignment by race. The redemption of constitutional rights should not have to depend upon waiting for the "right" judge.

Nor should constitutional rights and corresponding duties be so uncertain as to result in the imposition of conflicting duties in the same case, as has happened in the case at bar. The disparate treatment below of Denver's "core area" schools and its so-called "resolution" schools simply imposes upon the Denver School District conflicting duties. Denver has been told in one breath that its constitutional duty lies in classifying its pupils racially and that it must gerrymander four of its school boundaries to improve racial balance. It has been told in the next

breath that it need not classify racially and reassign all of its pupils on a racial basis. Such conflicting duties merely put off upon conflicting standards of proof substantive legal questions of the greatest moment.

When substantive questions are put off upon conflicting standards of proof, or when the "burden of proof" is shifted to require proof of a negative, the substantive rule comes to be wholly fictional and recognized as such however vigorous the disclaimer in dicta. Some such changes do not matter much. But some changes do. School desegregation cases result in mandatory injunctions disposing of an entire racially defined class, whether a member of the class wants such a "benefit" or not. They are sometimes even accompanied by the explicit denial of the right to intervene by persons who purport to speak for the class. Shifting the burden of proof in such unique "class actions" is particularly dangerous to the integrity of the judicial system. What is perceived as "discrimination" by a bystander may be perceived as a benefit by the person actually affected. Some pupils of Chinese ancestry, for example, view predominantly Chinese schools as superior in spite of a long history of prejudice and discrimination against Orientals in California. As Dr. Coleman commented about students in small town schools who were considering going to the University of Chicago: "They didn't know any better—all they were after was an education" (Coleman, *Adolescents and the Schools* (Basic Books, Inc., N.Y., 1965) p. 26). Nothing is more frustrating to the social engineer than the member of an oppressed minority who does not believe himself to be oppressed.

The constitutional requirement that there be a case or controversy assures an adversary process, which in turn justifies both the doctrine of res adjudicata which is supposed to bind the members of a class in a class action and the doctrine of precedent which binds everyone (*Sierra Club v. Morton* (1972) 92 S.Ct. 1361; but see, e.g., *Henry v. Godsell* (D.C. E.D. Mich. 1958) 165 F.Supp. 87, and *Davis v. School District of Pontiac, Inc.* (D.C. E.D. Mich. 1970) 309 F.Supp. 734, (6th Cir. 1971) 443 F.2d 573). The case or controversy disappears, and the adversary process disappears along with it, if a political organization can, by producing statistics and the history of some normal and necessary actions that can after the fact be construed as "segregatory", force a school district to choose between protracted litigation (which the school district must lose because undefined insufficient racial balance proves racial discrimination) and protracted transportation of the district's pupils. The only ones hurt are those who are to be allowed no voice, individually or collectively, the "beneficiaries" of the institution. For the parents of those "beneficiaries," be they white, black, red, or brown, recourse against a public institution which sometimes has as much in common with the jailor as with the fairy godmother is undercut by the very judicial system to which they must look for redemption of the pledge of due process of law.

A change to constitutionally required racial quotas in public schools is of too great moment for indulgence in legal fiction. For court-ordered and judicially supervised racial quotas would thus be impressed into the Constitution itself; the voting franchise would be undermined;

and unique "class actions" allowed at the outset as a means of protecting the person would have become instead the means for denial of due process of law. Worse still: required adoption of racial quotas accompanied neither by judicial supervision nor by a definite standard by which such quotas are to be established and administered would afford unlimited opportunities for racial discrimination beyond the establishment of quotas themselves.

C. Even if Denver committed "segregatory acts," equity should not require a district-wide remedy. Experience should preclude such a remedy.

Plaintiffs argue that only system-wide relief "promises to effectively remedy the effects of past discriminatory policy" (Pl.Br., p. 65). Admitted failure of proof as to most Denver schools is to be excused because all the school district's actions should be considered "prima facie illegal" where "the school authorities have been found guilty of intentional segregation as to some action" (Pl. Br., p. 66). Plaintiffs equate "the objective of equalizing educational opportunity" with the objective of racial quotas. Not only would plaintiffs shift to the school district the burden to explain why it has not established and maintained racial quotas in all of its schools, but they equate the "flexibility" of equitable remedies with the requirement that equity always go as far as this Court has most recently allowed.

Even equity power has limits (cf. *Sixty-seventh Minnesota State Senate v. Beens* (1972) 92 S.Ct. 1477). The remedy which plaintiffs urge upon Denver is not likely to be effective except in furtherance of Dr. Dodson's purpose to introduce dysfunction into another local public

school system. Plaintiffs' "remedy" for racial imbalance would be impermanent. It is, moreover, directed at the wrong body. Racial imbalance as well as the deficiencies in the institution of the public school would continue because both problems stem from conditions over which school boards have the least control and are at the same time the most vulnerable as the scapegoat.

In San Francisco, one immediate and direct effect of disruption of the entire system was the loss of about one-eighth of San Francisco's elementary school population. There is reason to believe that the loss was greatest among pupils formerly in schools which even the District Court in San Francisco found to be "integrated." We trust that in view of the pupils of Negro ancestry and Chinese ancestry included in San Francisco's dramatic pupil loss, characterizing that loss as "white" flight would be a further misuse of racial classification.

If school districts must provide against voluntary population movements, they will be hard pressed to stay one step ahead of their pupils. Mrs. Lewis "found that moving out of the core city to an integrated area provided only temporary integration" because other Negroes followed her (Pl.Br., p. 85). Senator Brown found his political position compromised because when the elimination of certain optional zones was discussed, the area in which he and another black elected official lived were to continue in the optional zone (A. 866a-867a, 875a). Senator Brown moved to another optional zone between a predominantly white and a predominantly black school, and his daughter attended the predominantly white school (A. 876a-877a). Barrett school was constructed to serve his residence area

and opened in 1960 as a predominantly black school, even though in 1957 Senator Brown's family was the first black family in his block (A. 876a-878a).

The population shifts which affected plaintiffs' witnesses have been demonstrated time and time again in cities which have been affected by Southern school remedies cases (see *Calhoun v. Cook* (D.C.N.D. Ga. 1971) 332 Fed.Supp. 804, order vacated in part (5 Cir. 1971) 451 F.2d 583). Even if it were proper that they seek to do so, neither school boards nor courts can any more assist Negro families to escape from other Negro families than they can assist white families to exclude Negroes.

Insofar as plaintiffs seek a remedy which will reform education, relief against Denver's school board undercuts the wrong body. Whatever requiring racial balance might do to improve racial balance temporarily, it would not improve educational opportunity. "Affirmative action to relieve racial imbalance" has enabled some to disguise the overdue public confession of the near bankruptcy of the public school (see Greer, *The Great School Legend* (Basic Books, N.Y., 1972) passim). "Racial imbalance" has enabled some to disguise the simple fact that the Negro community has succeeded where so many others have failed in stripping the emperor of garments never there. Since children will teach children when the institution has been unable to, one might reasonably conclude that it is not the institution which has been doing much teaching of anybody. By virtue of disguising teaching failure behind racial imbalance, the chief effect of "affirmative action" to date has been to leave the rabbits in charge of the lettuce patch. Many public school administrators today

have the most enthusiasm for "desegregation" and "equal opportunity" programs which require the expenditure of vast sums on large impersonal education parks (Sullivan, A. 1601a-1602a; Passow, ed. *Developing Programs for the Educationally Disadvantaged* (Teachers College Press, Colum. Univ., N.Y., 1968) pp. 314-316). They have no enthusiasm for compulsory reassignment of effective teachers to schools with low achievement levels. They are not even enthusiastic about such mild teacher "coercion" as offering higher pay scales for service in schools with low achievement levels. The NEA did not endorse *Brown* I or *Brown* II after studying the matter in 1959 (Lieberman, *The Influence of Teachers' Organizations Upon American Education* in Henry, ed. *Social Forces Influencing American Education*, National Society for the Study of Education, Sixtieth Yearbook, Part II, Univ. of Chi. Press, Chicago 1961). It is, therefore, not surprising that there is no comment from that quarter about teacher turnover in Denver's "core area" schools (A. 281a). There is no request from that quarter to remove seniority transfer provisions from teachers' union contracts. Such requirements exist in Denver as elsewhere (A. 260a, 261a, 266a, 308a). Equity has as much power over teachers' unions as over school boards; but there is only willingness to join in undermining local school boards and in compelling children and their families to undergo the educational and social trauma which accompanies frequent reassignment and larger more impersonal custodial institutions.

Neither the Constitution nor the flexibility of equity requires that Federal courts be used toward such ends. We find no evidence in the record in this case of any act

or policy which excluded pupils by race from Denver's schools. The Denver school board is entitled to retreat from experiment with boundary gerrymandering by suspect pupil assignment standards without suffering Federal jurisdiction in perpetuity. But if an experiment commits a school board irrevocably, then equity should direct itself to nothing beyond that experiment. Even then, equity should consider whether a court's judgment about such an experiment should be substituted for the judgment of a democratically chosen school board. Effective local democratic expression is a vital balance against the vast bureaucracy which the institution of the public school has become.

CONCLUSION

Plaintiffs argue not that laws requiring that school districts distinguish among pupils by race are wrong, but that the South simply had the wrong such laws. The right such laws, they say, should now be required by this Court. If we seek to teach our children that a man may not be judged by the color of his skin—if freedom of association is our goal—the lesson cannot be taught by constitutionally compelled racial classification by school districts. If we seek to teach our children that we value self-government, the lesson cannot be taught by removing the governance of public schools almost entirely from local democratic accountability in the guise of correcting the effect of racial discrimination.

The result would be the same whether racial quotas be explicitly approved or brought about by continued con-

flicting demands or an impossible burden of proof upon local school boards. To require that school districts substitute the racially defined population for the person under the Fourteenth Amendment coincident with the revival of Social Darwinism would be dangerously shortsighted (see, e.g., Ardrey, *The Social Contract* (Kingsford Press Inc., 1970); Jensen, *How Much Can We Boost IQ and Scholastic Achievement?* (1969) (39 Harv.Educ.Rev. 1). To impose upon school districts a constitutional duty to classify pupils racially for the purpose of school and classroom assignment would serve chiefly to perpetuate the myth that it is race which determines behavior, ability, accomplishment, and character. Given the purported correlation between race and academic achievement upon which plaintiffs base their argument that a school district must classify and assign its pupils racially, it would serve also as a measure—by race—of the nation's view of a pupil's prospects for academic success. No school district should be compelled by the Constitution of the United States to do that to any child.

The decision of the Tenth Circuit below should, therefore, be affirmed as it relates to Denver's "core area" schools. Certiorari should be granted and the decision of the Tenth Circuit reversed in No. 71-572.

Respectfully submitted,

Willis Hannawalt
Vivian Hannawalt

Counsel for Amici Curiae.